

No. 12298

United States
Court of Appeals
For the Ninth Circuit.

ALASKA STEAMSHIP COMPANY, a Corporation,
tion,

Appellant,

vs.

M. P. MULLANEY, Commissioner of Taxation,
Territory of Alaska,

Appellee.

Transcript of Record

Upon Appeal from the District Court
for the Territory of Alaska
Division Number One

FILED

AUG 15 1949

PAUL P. O'BRIEN,
CLERK

No. 12298

United States
Court of Appeals
For the Ninth Circuit.

ALASKA STEAMSHIP COMPANY, a Corpora-
tion,

Appellant,

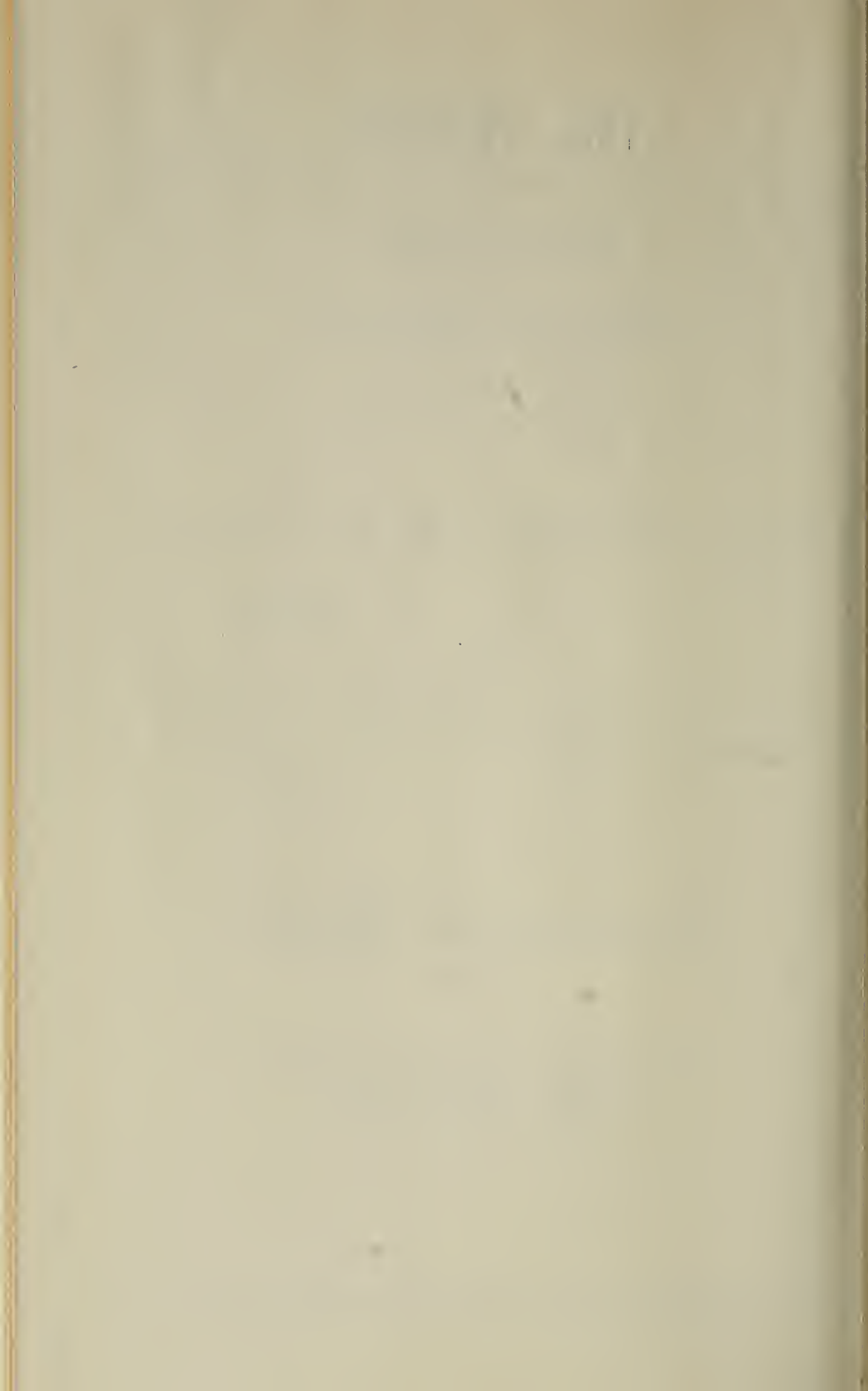
vs.

M. P. MULLANEY, Commissioner of Taxation,
Territory of Alaska,

Appellee.

Transcript of Record

Upon Appeal from the District Court
for the Territory of Alaska
Division Number One



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Affidavits in Support of Application for Preliminary Injunction.....	32
Appeal:	
Certificate of Clerk to Transcript of Record on.....	107
Citation on.....	79
Cost Bond on.....	76
Order Allowing.....	75
Petition for Allowance of.....	70
Preliminary Injunction Pending.....	101
Statement of Points Relied on and Designation of Parts of Record to Be Printed on	110
Assignments of Error.....	71
Attorneys of Record.....	1
Certificate of Clerk.....	107
Citation on Appeal.....	79
Cost Bond on Appeal.....	76
Defendant's Answer.....	38

INDEX	PAGE
Findings of Fact and Conclusions of Law.....	61
Conclusions of Law.....	66
Findings of Fact.....	62
Judgment and Decree.....	68
Opinion of the Court.....	44
Order Allowing Appeal.....	75
Order Correcting Conclusions of Law and Judgment and Decree.....	106
Order Settling and Allowing the Bill of Ex- ceptions	100
Order to Show Cause.....	37
Petition for Allowance of Appeal.....	70
Plaintiff's Complaint for Injunction and Other Relief and Exhibits Thereto.....	2-26
Plaintiff's Supplemental Complaint and Ex- hibits Thereto.....	27-31
Praecipe for Transcript of Record.....	104
Preliminary Injunction.....	42
Preliminary Injunction Pending Appeal.....	101
Reporter's Transcript of Record.....	82
Statement of Points Relied on and Designation of Parts of Record to Be Printed.....	110
Stipulation Re Printing of Record.....	80

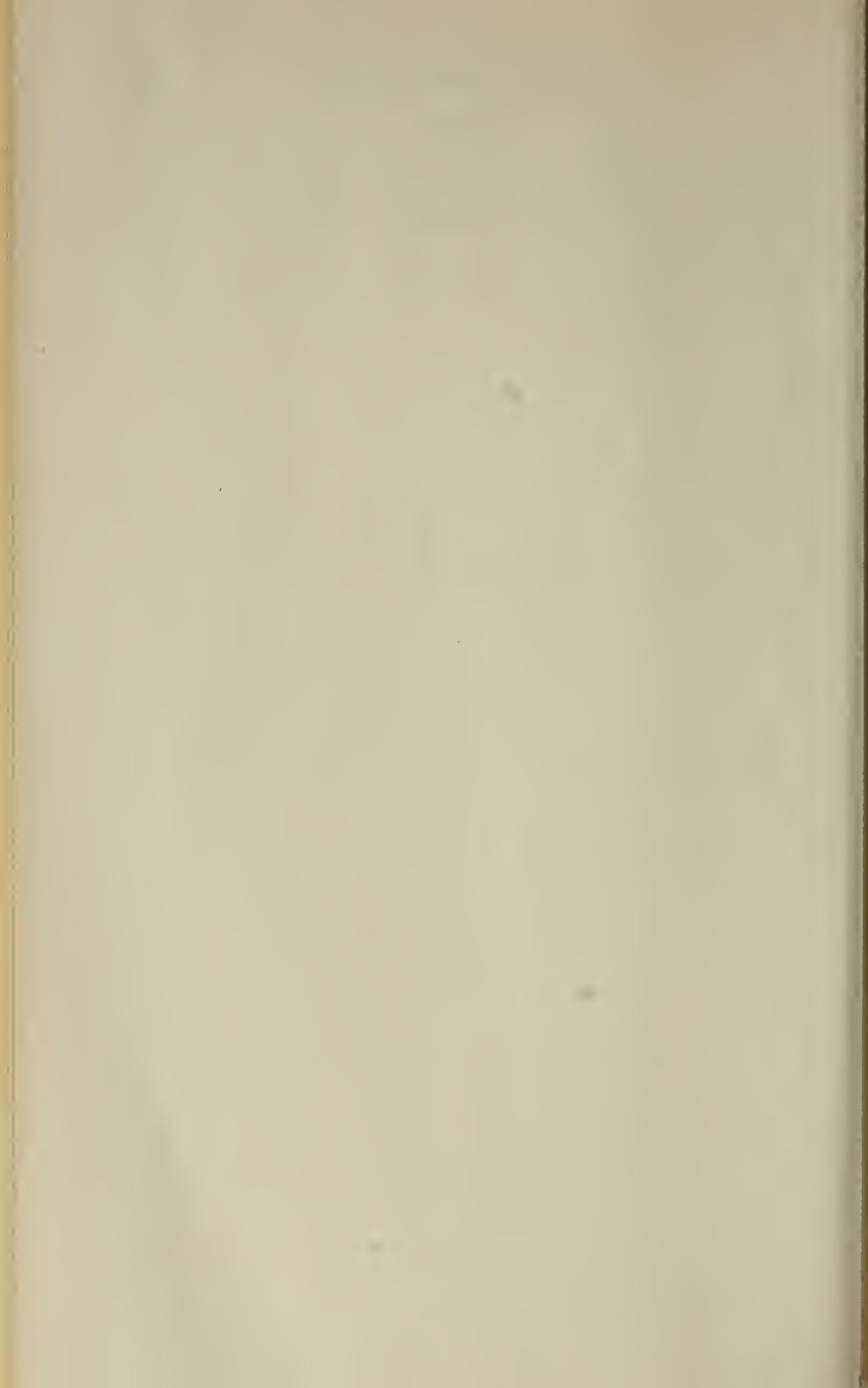
INDEX

PAGE

Witness, Plaintiff:

McCarthy, William Paul

—direct	83
—cross	95



ATTORNEYS OF RECORD

BOGLE, BOGLE & GATES,
FRANK L. MECHEM,

Central Building,
Seattle, Washington,

FAULKNER, BANFIELD & BOOCHEVER,
H. L. FAULKNER,

Juneau, Alaska.

For Appellants.

J. GERALD WILLIAMS,

Territorial Attorney General,
Juneau, Alaska.

For Appellee.

In the District Court for the Territory of
Alaska, First Division

No. 6069-A

ALASKA STEAMSHIP COMPANY,
a corporation,

Plaintiff,

vs.

M. P. MULLANEY, Commissioner of Taxation,
Territory of Alaska,

Defendant.

COMPLAINT FOR INJUNCTION
AND OTHER RELIEF

I.

Plaintiff, Alaska Steamship Company, is a corporation organized and existing under the laws of the State of Washington with its office and principal place of business at Pier 42, Seattle, Washington. Plaintiff is qualified to do business in the Territory of Alaska and has paid all necessary license taxes required by the Territory of Alaska as a condition of doing business and has filed its annual report for the last calendar year.

II.

Defendant is an officer of the Territory of Alaska, residing in Juneau, in the Territory of Alaska, and can be found within said Territory of Alaska, and has been and now is the Commissioner of Taxation for the Territory of Alaska, authorized by law to

collect taxes for the Territory of Alaska and to enforce the tax laws of the Territory, and is sued on account of acts which he immediately intends and threatens to perform under color of law in his official capacity as such Commissioner of Taxation.

III.

This action arises under the Act of March 26, 1949, designated as Alaska Net Income Tax Act.

IV.

On February 4, 1949 the District Court of the United States for the Western District of Washington, Northern Division, issued a Preliminary Injunction against Plaintiff in that certain action known as John E. Humes, Bob Dombroff and Sailors' Union of the Pacific vs. Alaska Steamship Company, No. 2192. That Preliminary Injunction, which is still in full force and effect, required Plaintiff to place any and all amounts deducted and withheld from the earnings of members of the [1*] Sailors' Union of the Pacific in accordance with the withholding requirements of Sections 5-B and 8 of the Alaska Net Income Tax Act in a special fund, and, pending further order of the court, to retain and keep said fund, and enjoins Plaintiff from paying any part thereof to the Territory of Alaska. A certified copy of the Preliminary Injunction is attached to this complaint and made a part hereof, marked "Exhibit A." The complaint filed in this

* Page numbering appearing at bottom of page of original certified Transcript of Record.

action, pursuant to which the Preliminary Injunction was issued, alleged as the ground for the Preliminary Injunction the invalidity of Sections 5-B and 8 of the Alaska Net Income Tax Act as applied to seamen. A copy of that complaint is attached hereto and made a part hereof, marked "Exhibit B."

V.

On April 4, 1949 the District Court of the United States for the Western District of Washington, Northern Division, issued a Supplemental Preliminary Injunction against Plaintiff in the same action described in paragraph IV of this complaint, which continued in effect the Preliminary Injunction previously issued on February 4, 1949 and made the same applicable to withholdings made by Plaintiff from the earnings of members of the Sailors' Union of the Pacific in accordance with the withholding requirement of Sections 5-B and 8 of the Act of March 26, 1949, which repealed the Act of January 22, 1949, and was enacted in lieu thereof; both statutes being designated as Alaska Net Income Tax Act. A certified copy of the Supplemental Preliminary Injunction is attached to this complaint and made a part hereof, marked "Exhibit C."

VI.

Beginning with the payoff of the crew of the S.S. Chief Washakie, a vessel in the Alaska trade owned and operated by Plaintiff, on or about January 31, 1949, Plaintiff has deducted and withheld from the wages due and payable to the crew members of all

vessels owned or operated by Plaintiff, an amount equal to ten per cent (10%) of the tax deducted and withheld in accordance with the provisions of sub-Chapter (D), Chapter 9 of the Internal Revenue Code of the United States, as required by Sections 5-A and 8 of the Alaska Net Income Tax Act, which withheld amounts have been placed in the special fund and subject to the Preliminary and Supplemental Preliminary Injunctions described in paragraphs IV and V of this Complaint.

VII.

Defendant, purportedly acting pursuant to Section 8-D of the Alaska Net [2] Income Tax Act, has issued regulations requiring Plaintiff to pay over to the Territory of Alaska all amounts withheld and required to be withheld under Sections 5-B and 8 of the Act on or before April 30, 1949. Severe penalties are imposed by the Alaska Net Income Tax Act for failure to make payment of withheld amounts to the Territory of Alaska at the time required by Defendant's regulations.

VIII.

Plaintiff alleges that Sections 5-B and 8 of such Alaska Net Income Tax Act are invalid with respect to wages received by vessel personnel employed by Plaintiff, and that by reason of said Preliminary and Supplemental Preliminary Injunctions, Plaintiff is legally restrained from complying with such Sections of such Act and Defend-

ant's regulations purportedly issued pursuant thereto.

IX.

Plaintiff further alleges that such Alaska Net Income Tax Act is invalid in its entirety, and therefore necessarily invalid with respect to wages received by vessel personnel employed by plaintiff, because: (1) it violates the uniformity requirement of Section 9 of the Organic Act for the Territory of Alaska (37 Stat. 512); (2) it unlawfully attempts to delegate legislative functions to Congress and to the Commissioner of Internal Revenue; (3) it unlawfully attempts to delegate legislative functions to the Commissioner of Taxation for the Territory of Alaska; (4) it imposes a direct burden on interstate commerce in violation of the Commerce Clause of the Constitution of the United States (Article I, Section 8); (5) it fails to provide a proper allocation formula for fixing the amount of tax to be paid by persons having income from sources within and from without the Territory of Alaska; (6) it will effect such palpably arbitrary discriminations between tax-payers that it violates the Due Process and Equal Protection Clauses of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and the Due Process Clause of the Fifth Amendment of the Constitution of the United States; (7) it is so vague and indefinite that it violates the Due Process Clauses of the Fifth and Fourteenth Amendments of the Constitution of the United States.

X.

Plaintiff is threatened with an immediate, substantial and irreparable injury for which it has no adequate remedy at law, because of Defendant's regulation and the provisions of Sections 5-B and 8 of the Alaska Net Income Tax Act requiring Plaintiff to withhold as therein provided upon the wages of vessel personnel [3] employed by Plaintiff and to pay the same over to the Territory of Alaska on or before April 30, 1949.

Wherefore, Plaintiff prays:

(1) That process issued against the Defendant to answer this complaint (but not under oath or affirmation and the benefit whereof is expressly waived by the plaintiff);

(2) That after notice and hearing, this Court grant to Plaintiff a Preliminary Injunction restraining Defendant from doing any acts or things for the purpose of collecting from Plaintiff any amounts withheld from vessel personnel pursuant to Sections 5-B and 8 of the Alaska Net Income Tax Act;

(3) And that upon final hearing this court enter a final order and decree to the same effect;

(4) That upon such final hearing this court enter an order adjudging and decreeing that:

(a) The Alaska Net Income Tax Act is null and void and of no legal effect;

(b) Sections 5-B and 8 of the Alaska Net Income Tax Act are null and void and of no legal effect with respect to wages received by vessel personnel employed by Plaintiff.

(5) And such other and further relief as to this court may seem meet.

ALASKA STEAMSHIP
COMPANY,

By /s/ R. C. ANDERSON,
Executive Vice President,
FAULKNER, BANFIELD &
BOOCHEVER,

By /s/ H. L. FAULKNER,
BOGLE, BOGLE & GATES,

By /s/ FRANK L. MECHEM,
Attorneys for Plaintiff. [4]

State of Washington,
County of King—ss.

R. C. Anderson, being first duly sworn, on oath deposes and says:

That he is Executive Vice President of Alaska Steamship Company, the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true as he verily believes.

[Seal] /s/ R. C. ANDERSON.

Subscribed and sworn to before me this 5th day of April, 1949.

/s/ LLOYD SHORETT,
Judge of the Superior Court of the State of Wash-
ington, in and for King County.

State of Washington,
County of King—ss.

I, Norman R. Riddell, County Clerk of King County and ex-officio Clerk of the Superior Court of the State of Washington for the County of King, do hereby certify that the Honorable Lloyd Shorett, who has signed the foregoing certificate, is the duly elected and qualified Judge of said Court, and that the signature of said Judge to said certificate is his genuine handwriting.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said Court this 5th day of April, 1949.

[Seal] /s/ NORMAN R. RIDDELL,
Clerk. [5]

EXHIBIT A

In the United States District Court of the Western
District of Washington, Northern Division

No. 2192

JOHN E. HUMES, BOB DOMBROFF and
SAILORS' UNION OF THE PACIFIC,
a voluntary association,

Plaintiffs,

vs.

ALASKA STEAMSHIP COMPANY, a
corporation,

Defendant.

PRELIMINARY INJUNCTION

This matter comes regularly before the court upon the plaintiffs' complaint and application for a preliminary injunction, the plaintiff Bob Dombroff being present in person and all the plaintiffs being represented by John Geisness of Bassett & Geisness, their attorneys, and the defendant being represented by Stanley B. Long and Frank L. Mechem of Bogle, Bogle & Gates, its attorneys, notice of hearing upon said application for preliminary injunction being waived and the court having read and considered said complaint of the plaintiffs and an affidavit in support of said application for a preliminary injunction and having received testimony in open court in support of the allegations of said complaint, and having heard and considered the arguments and

statements of counsel for the respective parties; now, upon motion of the plaintiffs,

It Is Ordered that defendant Alaska Steamship Company, a corporation, place any and all amounts deducted and withheld from the earnings of the plaintiff John E. Humes or other unlicensed members of the deck departments of vessels operated by defendant in trade between Puget Sound, Washington, and Alaska points under claimed authority and requirement of a certain statute of the Territory of Alaska, and particularly Sections 5 and 8 thereof, purporting to authorize and require certain deductions and withholdings from the earnings of employees, entitled Alaska Net Income Tax Act, and approved by the Governor of the Territory of Alaska January 22, 1949, in a special fund to be entitled Alaska Withholding Fund and that, until further order of this Court, said defendant shall retain and keep said fund and shall pay no part of said fund to the Territory of Alaska and shall make no other, further or different disposition of the amounts so deducted and withheld. [6]

This preliminary injunction shall take effect upon the filing by the plaintiffs of a bond in the sum of \$500.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Done in Open Court this 4th day of February, 1949.

LLOYD L. BLACK,
U. S. District Judge.

Presented by:

JOHN GEISNESS,

Of Attorneys for Plaintiffs,
and approved as to form. Copy received / and
notice of presentation expressly waived.

BOGLE, BOGLE & GATES,

FRANK L. MECHEM,

Attorneys for Defendant.

I hereby certify that the annexed instrument is
a true and correct copy of the original on file in my
office.

Attest:

MILLARD P. THOMAS,

Clerk, U. S. District Court, Western District of
Washington.

[Seal] By /s/ WALLACE PETERSON,
Deputy Clerk.

Received Feb. 4, 1949, United States Marshal,
Seattle, Wash.

Served on W. P. McCarthy, C 3:20 P.M., Feb.
4, 1949.

Plaintiff's Exhibit No. 2 Received in Evidence
April 22, 1949. [7]

EXHIBIT B

[Title of District Court and Cause.]

COMPLAINT

For cause of action plaintiffs allege:

I.

The defendant is and at all times herein mentioned has been a corporation organized and existing under the laws of the State of Washington and at all times herein mentioned said corporation has operated and still operates merchant vessels in maritime commerce between Puget Sound, Washington, and Alaska points, and does business in the Western District of Washington.

II.

At all times herein mentioned plaintiff John E. Humes has been and still is employed by the defendant as an unlicensed member of the deck department of the SS Chief Washakie, one of the vessels operated by defendant in said maritime commerce, and has been and is a member of the crew of said vessel. At all times herein mentioned plaintiff Sailors' Union of the Pacific has been and is a voluntary association of merchant seamen and each and all of the unlicensed members of the deck departments of said vessels operated by defendant in said maritime commerce have been and are members of said plaintiff association and said plaintiff association at all times herein mentioned has been and still is the duly authorized and established bar-

gaining agent for each and all of said employees with respect to the terms and conditions of their employment and particularly with respect to all of the matters and things that are the subject matter of this complaint. Plaintiff Dombroff is the Seattle agent for said voluntary association with respect to all of the matters and things that are the subject matter of this complaint.

III.

Defendant at present operates about 14 ships in said maritime commerce and [8] employes in excess of 250 unlicensed members of the deck departments on said vessels. Said employees are too numerous to be mentioned and with respect to the subject matter of this complaint are similarly situated with plaintiff John E. Humes and plaintiffs bring this action for and on behalf of all of said employees because they are too numerous to be individually joined. Most of said employees are not residents of Alaska.

IV.

On or about the 31st of January, 1949, certain shipping articles between the captain of the SS Chief Washakie, acting for defendant, and the crew thereof were terminated and the crew thereof was purportedly paid off by defendant through its representatives, but said defendant, through its agents, officers and representatives thereupon failed and refused to pay to said crew members or to any of them all of the wages then due to them, but de-

ducted therefrom, in addition to deductions authorized by federal law, an additional 10% of the tax deducted and withheld in accordance with the provisions of sub-chapter (D), Chapter 9 of the Internal Revenue Code of the United States and said defendant threatens to, and will, unless restrained by this court, retain and withhold from all future earnings of all seamen aboard said vessels said amount in addition to such deductions as are authorized by federal law. Said SS Chief Washakie on the voyage to which said shipping articles pertain operated a substantial part of the term of said voyage outside of Alaska waters upon the high seas, in foreign waters and in waters within the territorial limits of the State of Washington and a substantial part of the services through which said wages were derived were rendered in said waters, although portions thereof were earned while the vessel was in ports in the Territory of Alaska. During each and every future voyage of defendant's ships the ship engaged in each voyage will operate for a substantial part of the time consumed by such voyage upon the high seas or in foreign waters and waters within the territorial limits of the state of Washington and the earnings of each and all of the crew members on each of such voyages will be derived from services rendered in such waters.

V.

Defendant has withheld and retained said portion of earnings and threatens in the future to withhold and retain a like portion of all earnings

solely in reliance upon the purported validity of Section V and Section VIII of a purported statute enacted by the legislature of the Territory of Alaska and approved by the Governor of said Territory on the 22nd day of January, 1949. True and correct copies of said Sections V and VIII of said purported statute are attached hereto, [9] marked Exhibit A and incorporated herein by this reference.

VI.

As applied to plaintiff Humes and the other seamen on whose behalf this action is brought, said purported statute violates Article III, Section II, of the Constitution of the United States because it is an unwarranted invasion of the admiralty and maritime jurisdiction of the United States and, if applied to said plaintiff and said other seamen, does and will prejudice and adversely affect the uniformity and consistency of the general maritime law. As so applied said statute violates Article I, Section VIII of the Constitution of the United States in that it places an undue burden on interstate and foreign commerce and violates the Fourteenth Amendment to the Constitution of the United States because it places a tax upon earnings of non-residents of Alaska derived from services rendered outside of Alaska and violates Article VI, Section II, of the Constitution of the United States because said withholding and deduction is and will be in violation of and contrary to the laws of the United States and particularly the provisions of Title 46

U.S.C.A. Sections 596, 597, 601, 605, 682, 683 and 685. The plaintiffs have no adequate remedy at law and will be irreparably injured unless defendant is enjoined and restrained from making said withholding and deduction and unless defendant is so enjoined and restrained there will be a multiplicity of suits to recover the amounts deducted and withheld. An emergency exists because defendant proposes and intends to commence voyages of certain ships in said maritime commerce within three days from the date hereof and defendant's unlicensed deck department employees are not willing to work aboard said ships when it is believed that defendant will, as expressly stated by it, withhold and deduct said amounts in violation of the constitutional and statutory rights of such employees. The amount in controversy in this action exceeds the sum of \$3000.00, exclusive of interest and costs. All of said deducting and withholding has occurred and will occur within the Western District of Washington.

Wherefore, plaintiffs pray that this court issue an order restraining defendant until further order of this court from making any deduction from the pay of plaintiff Humes or other employees for and on whose behalf this suit is brought in purported reliance upon said act of the legislature of the Territory of Alaska and plaintiffs further pray for judgment and decree of this court declaring said Sections unconstitutional and invalid insofar as they purport to [10] authorize and require deductions

and withholding of any part of the earnings of crew members of ships operated by defendant in the trade hereinabove described and permanently enjoining and restraining the defendant herein from making said deductions and from withholding any part of said earnings in purported reliance upon said statute of the Territory of Alaska. Plaintiffs further pray for such other and further relief as to the court may appear just.

/s/ JOHN GEISNESS,
BASSETT & GEISNESS,
Attorneys for Plaintiffs.

United States of America,
State of Washington,
County of King—ss.

Bob Dombroff, being first duly sworn, on oath deposes and says:

That he is one of the plaintiffs in the above-entitled cause; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

BOB DOMBROFF.

Subscribed and sworn to before me this 3rd day of February, 1949.

JOHN GEISNESS,
Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed April 8, 1949. [11]

EXHIBIT A

Section 5

Tax on Individuals, Fiduciaries, Corporations
and Banks.

A. General Rule.

There is hereby levied and there shall be collected and paid for each taxable year upon the net income of every individual (except employees whose sole income in Alaska consists of wages or salary upon which tax has been withheld as referred to in subsection B of this section), fiduciary, corporation and bank, required to make a return and pay a tax under the Federal income tax law, a tax computed by either one of the following methods:

(1) a tax equal to 10 percent of the total income tax payable for the same taxable year to the United States under the provisions of the Internal Revenue Code, as computed without the benefit of the deduction of the tax payable hereunder to the Territory.

(2) a tax equal to ten percent of that portion of the total income tax payable under the provisions of the Internal Revenue Code, as computed without the benefit of the deduction of tax payable hereunder to the Territory, that gross receipts derived from sources within the Territory, payroll and value of tangible property located in the Territory, bears to the total gross receipts from sources within and without the Territory, payroll and value of tangible property within and without the Territory.

(a) Determination of Gross Receipts.

Gross receipts from sources within the Territory shall consist of interest rents, royalties, gains, dividends, all other income, and gross income received or derived in connection with property owned or a business or trade carried on and salaries, wages and fees for personal services performed within the Territory. Income received or derived from sales wherever made of goods wares and merchandise manufactured or originating in the Territory shall be considered to be a part of gross receipts from sources within the Territory.

(b) Determination of Property and Payroll
Factors for Freight and Passenger Carriers.

The value of vessels operating on the high seas and compensation of employees engaged in operating such vessels shall be apportioned to the Territory in the ratio which the number of days spent in ports within the Territory bears to the total number of days spent in ports within and without the Territory. The value of aircraft and automotive vehicles operating as freight and passenger carriers from to and within the Territory and compensation of employees engaged in such operations, shall be apportioned to the Territory in the ratio which the number of days during which such services are rendered within the Territory bears to the total number of days during which such services are rendered within and without the Territory. [12]

(c) Apportionment of Tax by Tax Commissioner.

If the taxpayer, upon petition to the Tax Commissioner, as provided in Section 13 of this Act, conclusively demonstrates that because of other factors, the method of allocation hereinabove provided, results in a larger tax than in equity and good conscience he should have been required to pay, then the tax shall be determined, allocated and apportioned under such processes and formulas as the Tax Commissioner shall provide, and the Tax Commissioner may promulgate proper apportionment rules and regulations conformable with this Act for general application in similar cases. In the case of two or more organizations, trades or businesses owned or controlled directly or indirectly by the same interests, the Tax Commissioner is authorized to distribute, apportion, or allocate the tax where such action is necessary to prevent evasion of payment.

B. Employees.

There is hereby levied upon and there shall be collected from every employee (including persons referred to in subsection (C) of Section 1621 of the Internal Revenue Code) whose sole income in Alaska during the taxable year consists of wages or salary, a tax in the amount of ten percent of the tax deducted and withheld under the provisions of sub-chapter (D), Chapter 9, of the Internal Revenue Code, which tax is to be withheld by the employer under the provisions of Section 8 of this Act. The word "employer" includes all Territorial

departments, agencies and institutions and political subdivisions; Provided, that the foregoing language of this subsection shall not apply to Federal employees or others not subject to the withholding provisions of this Act, but such persons shall be liable under the general rule set forth in Section 5, and must file returns and make payment accordingly. [13]

Section 8.

Collection of Income Tax at Source.

A. Definitions.

As used in this section, with the exception of governmental employees, the terms "wages", "payroll period", "employee", and "employer" shall have the meaning attributed to such terms by subsections (a), (b), (c) and (d) respectively, of section 1621 of the Internal Revenue Code.

B. Requirement of Withholding.

Every employer making payment of wages or salaries shall deduct and withhold a tax in the amount of 10 percent of the tax deducted and withheld under the provisions of subchapter (D), chapter 9 of the Internal Revenue Code.

C. Rules Applicable.

The rules with respect to withholding of tax set forth in Section 1622 of the Internal Revenue Code shall apply with respect to this section as though fully set forth herein. Remittance of taxes withheld must be accompanied by returns on forms prescribed by the Tax Commissioner.

D. Payment of Tax Withheld.

Every employer making payments of wages—

(1) shall be liable for the payment of the tax required to be deducted and withheld under this section and shall not be liable to any individual for the amount of any such payment; and

(2) must make return of and pay to the Tax Commissioner quarterly, or at such other times as the Tax Commissioner may allow, the amount of tax levied which, under the provisions of this Act, he is required to deduct and withhold. Upon failure of the employer to comply with the provisions of this paragraph, the provisions of Section 11 of this Act shall apply.

E. Return and Payment by Governmental
Employer.

If the employer is the United States or the Territory or a political subdivision thereof, or an agency or instrumentality of any one or more of the foregoing, the return of the amount deducted and withheld upon any wages or salaries may be made by any officer of said employer having control of the payment of such wages or salaries or appropriately designated for that purpose.

I hereby certify that the annexed instrument is

a true and correct copy of the original on file in my office.

Attest:

MILLARD P. THOMAS,
Clerk, U. S. District Court, Western District of
Washington.

[Seal] By TRUMAN EGGER,
Chief Deputy Clerk.

4/5/49

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 4, 1949. [14]

EXHIBIT "C"

[Title of District Court and Cause.]

SUPPLEMENTAL PRELIMINARY
INJUNCTION

This matter comes regularly before the court upon the plaintiffs' supplemental complaint and application for a preliminary injunction, the plaintiffs being represented by John Geisness of Bassett & Geisness, their attorneys, and the defendant being represented by Frank L. Mechem of Bogle, Bogle & Gates, its attorneys, notice of hearing upon said application being waived, and the court having read and considered the records and files herein and an affidavit supporting said application, and having heard and considered the arguments and statements

of counsel for the respective parties, now, upon motions of plaintiffs,

It Is Ordered that defendant Alaska Steamship Company, a corporation, place any and all amounts deducted and withheld from the earnings of the plaintiff John E. Humes, or other unlicensed members of the deck departments of vessels operated by the defendant in trade between Puget Sound, Washington, and Alaska points under claimed authority and requirement of a certain statute of the Territory of Alaska approved March 26, 1949, known as House Bill 92 and as Alaska Net Income Tax Act, purporting to authorize and require certain deductions and withholdings from the earnings of employees, in the special fund designated and described and provided for in the preliminary injunction entered herein February 4, 1949, and It Is Further Ordered that said preliminary injunction, entered February 4, 1949, is in all respects confirmed and continued in effect.

In view of the fact that said amounts deducted and withheld will remain in the care custody and control of defendant, defendant has waived the requirement of any additional bond, and no additional bond shall be required of plaintiffs.

Done in Open Court this 4th day of April, 1949.

JOHN C. BOWEN,

U. S. District Judge. [15]

Presented by:

JOHN GEISNESS,

Of Attorneys for Plaintiffs.

Copy received and approved as to form and notice of presentation expressly waived.

BOGLE, BOGLE & GATES,
FRANK L. MECHEM,

Attorneys for Defendant.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest:

MILLARD P. THOMAS,

Clerk, U. S. District Court, Western District of
Washington.

[Seal] By TRUMAN EGGER,

•Chief Deputy Clerk.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, April 4, 1949.

Plaintiff's Exhibit No. 3 Received in Evidence
April 21, 1949. [16]

In the District Court for the Territory of Alaska,
First Division

No. 6069-A

ALASKA STEAMSHIP COMPANY,

a corporation,

Plaintiff,

vs.

M. P. MULLANEY, Commissioner of Taxation,
Territory of Alaska,

Defendant.

SUPPLEMENTAL COMPLAINT

Supplementing its complaint filed herein, plaintiff alleges:

I.

That for the reasons stated in paragraph IX of said original complaint, the Alaska net income tax is invalid in its entirety and therefore necessarily invalid with respect to wages received by employees of plaintiff who do not constitute vessel personnel.

II.

That the Act of January 22, 1949, known as The Alaska Net Income Tax Act, was and is invalid in its entirety with respect to wages received by all employees of plaintiff because the Special Session of the Legislature of the Territory of Alaska, which enacted said Act, was not a lawfully constituted session of said legislature and had no legal authority to enact such a law.

Wherefore, plaintiff prays:

(1) That paragraph (2) of the prayer for relief contained in the original complaint be expanded to include not only vessel personnel, but also all other persons employed by plaintiff and that paragraph (4) (b) of said prayer for relief be expanded to also include all other persons employed by plaintiff.

(2) That this Court grant to plaintiff a preliminary injunction restraining defendant from doing any act or thing for the purpose of collecting from plaintiff any amount withheld from any employees of plaintiff pursuant to Sections 5-B and 8 of The Alaska Net Income Tax Act of January 22, 1949, and that upon final hearing this Court enter an order adjudging and decreeing that said Alaska Net Income Tax Act of January 22, 1949, was and is null and void and of no legal effect.

ALASKA STEAMSHIP
COMPANY,

By FAULKNER, BANFIELD &
BOOCHEVER,

By BOGLE, BOGLE & GATES,
Attorneys for Plaintiff,

By FRANK L. MECHEM. [17]

United States of America,
Territory of Alaska—ss.

I, H. L. Faulkner, being first duly sworn, depose and say:

That I am attorney for Alaska Steamship Company, a corporation, the plaintiff herein above

named, and make this verification on its behalf, and that I make it for the reason that there is no officer or agent of the corporation available at the time and place where the verification is required to be made; and that I have read the foregoing supplemental complaint and know its contents and that the facts stated therein are true and correct, as I verily believe.

H. L. FAULKNER.

Subscribed and sworn to before me this 20th day of April, 1949.

[Seal]

R. BOOCHEVER,

Notary Public for Alaska.

My commission expires: Oct. 20, 1951.

Copy received April 21, 1949.

JOHN H. DIMOND,

Attorney for Defendant.

Filed in the District Court, Territory of Alaska, 1st Division, at Juneau, April 21, 1949. [18]



PLAINTIFF'S EXHIBIT No. 1

(continued)

Plaintiff's Exhibit No. 1 consists of four forms, the original, duplicate, triplicate and work copy with carbon sheets between forms. Forms 2, 3 and 4 are duplicates of the preceding photostat with the exception of the bottom line, reading: Original—This copy shall be attached to the Original Summary in order of listing.

On the second form the bottom line reads: Duplicate—Seaman's Copy.

On the third form the bottom line reads: Triplicate—Operating Department Copy.

On the fourth form the bottom line reads: Work Copy.

AFFIDAVIT

No. 6069-A

Territory of Alaska,
First Division—ss.

W. P. McCarthy, being first duly sworn, upon his oath states that:

1. He is Assistant Treasurer of Alaska Steamship Company, a Washington corporation, with its office and principal place of business at Pier 42, Seattle, Washington, and that he has been employed by said Company for twenty-two years last past.

2. The Alaska Steamship Company is qualified to do business in the Territory of Alaska and has paid all necessary license taxes required by the Territory of Alaska as a condition of doing business and has filed its annual report for the last calendar year.

3. Affiant is, among other things, the Chief Auditor for the Company in charge of its Auditing Department and of all books and records of the Company pertaining to payroll and payroll taxes.

4. The Company operates, as a common carrier, passenger and freight vessels between Seattle, Washington, and various ports in Alaska, and between ports in Alaska, including Ketchikan, Wrangell, Petersburg, Sitka, Juneau, Cordova, Valdez, Seward, Kodiak, Seldovia, Nome, and all cannery ports and outports where business warrants.

5. The Company presently operates 12 vessels in the Alaska Trade, employing a total of 706 seamen, all of whom are nonresidents of the Territory of Alaska.

6. The Company presently averages four sailings per week from Seattle in the Alaska trade and approximately 75% of each voyage occurs within the Territorial waters of Alaska.

7. With respect to the seamen operating its vessels in the Alaska trade, a separate employment contract is entered into for each voyage at rates of pay set forth in the wage schedules of each contract. At the end of each voyage the seamen are paid off in Seattle, Washington, on the basis of an itemized wage statement which shows gross wages and deductions from such wages, including withholding for Federal income tax purposes and for Alaska income tax purposes. A copy of the wage statement form, designated as Seamen's State of Account, is attached hereto and made a part hereof, marked Exhibit "A." [20]

8. The total amount withheld from seamen's wages for the first quarter of 1949 in accordance with the requirements of Sections 5-B and 8 of the Alaska Income Tax Law was \$7,399.75. The Company has continued to withhold income tax under the Alaska Income Tax Law on all voyages completed since the end of the first quarter of 1949 at the rates and in the manner prescribed by the Alaska Income Tax Law.

9. The Company maintains offices in the Territory of Alaska at Ketchikan, Juneau, Sitka, Cordova, Valdez, Seward, Kodiak, Nome, Anchorage and Fairbanks. These offices have a total of 19 employees who are residents of the Territory of Alaska

and the Company has withheld the required amount of tax under the Alaska Income Tax Law from the salaries paid to these employees.

10. On February 4, 1949, the Company was served with a preliminary injunction issued by the District Court of the United States for the Western District of Washington, Northern Division, in the case of John E. Humes, Bob Dombroff and Sailors' Union of the Pacific vs. Alaska Steamship Company, No. 2192, which required the Company to place any and all amounts deducted and withheld from the earnings of members of the Sailors' Union of the Pacific in accordance with the withholding requirements of Section 5-B and 8 of the Alaska Income Tax Law in a special fund, and, pending further order of the Court, to retain and keep such fund, and enjoin the Company from paying any part thereof to the Territory of Alaska. On April 4, 1949, the same Court issued a supplemental preliminary injunction against the Company in the same case which continued in effect the preliminary injunction previously issued on February 4, 1949, and made the same applicable to withholdings made by the Company from the earnings of members of the Sailors' Union of the Pacific in accordance with the withholding requirement of Sections 5-B and 8 of the Act of March 26, 1949, which repealed the Act of January 22, 1949, and was enacted in lieu thereof.

11. The Company has received from the Commissioner of Taxation for the Territory of Alaska

forms of returns together with instructions requiring the Company to pay over to the Territory of Alaska all amounts withheld and required to be withheld under Sections 5-B and 8 of the Alaska Income Tax Law on or before April 30, 1949.

12. As the only alternative to the filing of additional suits against the Company by the other seamen's unions in Seattle, Washington, the Company entered into agreements with those unions which agreements were identical in terms with the orders issued by the Court in the case of *John E. Humes, Bob Dombroff and Sailors' Union of the Pacific vs. Alaska Steamship Company*. Pursuant to these agreements the Company has withheld, in accordance with the requirements of the Alaska Income Tax Law, on the voyage pay of the seamen and has placed such withheld amounts in the Special fund created pursuant to the orders of the Court in *Humes et al vs. Alaska Steamship Company*.

13. Computations have been made, based upon the 1948 operations of the Company, for the purpose of ascertaining the effect of the taxing provisions of Section 5-A of the Alaska Income Tax Law upon the Company. Although no regulations have as yet been issued by the defendant in connection with the application of the allocation formula provided for by Section 5-A, the computations which the Company has made attempt, as closely as possible, to apply the formula as set forth in the statute. After making the computations it has been determined that approximately 45% of the amount of

the Company's Federal income tax, if any, would be subject to the 10% Alaska income tax as provided for in Section 5-A of the Alaska Income Tax Law.

14. The Company is presently operating as described in Paragraphs 4, 5 and 6 of this affidavit and intends to continue to operate in that manner throughout the remainder of the year 1949.

W. P. McCARTHY.

Subscribed and sworn to before me this 21st day of April, 1949.

[Seal] R. BOOCHEVER,

Notary Public in and for the Territory of Alaska,
residing at Juneau.

Filed in the District Court, Territory of Alaska,
1st Division, at Juneau, April 22, 1949. [22]

SUPPLEMENTAL AFFIDAVIT

6069-A

United States of America,
Territory of Alaska—ss.

W. P. McCarthy, being first duly sworn, upon his oath states:

1. That the Alaska Steamship Company has 120 employees, other than shop employees and watchmen, who are non-residents of the Territory of Alaska, some of whom annually make trips to and spend substantial time in the Territory of Alaska upon business of the Company, including several such trips already made during the year 1949.

2. Of the amount of \$7,399.75 withheld upon the wages of vessel personnel for the first quarter of 1949 under the Alaska Income Tax law, all but approximately \$125.00 was withheld under the act of January 22, 1949.

3. For the first quarter of 1949, there was withheld upon the wages of other employees of the company the amount of \$2,319.96 under the Act of January 22, 1949.

/s/ W. P. McCARTHY.

Subscribed and sworn to before me this 21st day of April, 1949.

[Seal] /s/ R. BOOCHEVER,

Notary Public for Alaska.

My commission expires October 20, 1951.

Copy received April 22, 1949.

/s/ MARTHA WENDLING,

Sec. to Atty. Gen'l.

Filed in the District Court, Territory of Alaska, 1st Division at Juneau April 22, 1949. [23]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

This matter having come on upon the application of the plaintiff for an Order to Show Cause why a temporary restraining order should not be issued herein, and the sworn complaint of the plaintiff having been filed and considered, It Is Now, Therefore, Ordered

That the defendant be and he is hereby cited to appear before this Court at Juneau, Alaska, at ten o'clock A.M. on the 22nd day of April 1949 to show cause, if any there be, why an injunction pendente lite should not be granted restraining the defendant and all persons acting on his behalf from doing any act or thing for the purpose of collecting from plaintiff any amounts withheld from the wages of vessel personnel pursuant to Section 5-B and 8 of the Alaska Net Income Tax Act of March 26, 1949, during the pendency of this action, and until a trial of the issues which may be involved in the above-entitled cause may be had, and

It Is Further Ordered that a certified copy of this order be served upon the defendant not less than eight (8) days before the date of the hearing.

Dated at Juneau, Alaska April 8, 1949.

GEORGE W. FOLTA,
Judge.

Received April 8, 1949.

Civil Docket No. 26, P 265.

For Service by Deputy Hellan.

Filed and entered in the District Court, Territory of Alaska, 1st Division, at Juneau, April 9, 1949.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant above-named, and in answer to plaintiff's complaint filed herein, admits, denies and alleges as follows:

I.

Answering Paragraph 1 of plaintiff's complaint, defendant alleges that he does not have facts sufficient to form an opinion as to the truth or falsity of the allegations contained therein, and, therefore, denies the same upon that ground.

II.

Defendant admits the allegations contained in Paragraph II of plaintiff's complaint.

III.

Defendant admits the allegations contained in Paragraph III of plaintiff's complaint.

IV.

Referring to Paragraph IV of Plaintiff's complaint, defendant alleges that he does not have sufficient information to form an opinion as to the truth or falsity of the allegations contained therein, and, therefore, denies the same upon that ground.

V.

Referring to Paragraph V of plaintiff's complaint, defendant alleges that he does not have sufficient information to form an opinion as to the truth or falsity of the allegations contained therein, and therefore, denies the same upon that ground.

VI.

Referring to Paragraph VI of plaintiff's complaint, defendant alleges that he does not have sufficient information to form an opinion as to the

truth or falsity of the allegations contained therein, and, therefore, denies the same [25] upon that ground.

VII.

Answering Paragraph VII of plaintiff's complaint, defendant admits the allegations contained therein.

VIII.

Answering Paragraph VIII of plaintiff's complaint, defendant denies the allegations contained therein.

IX.

Defendant denies each and every material allegation contained in Paragraph IX of plaintiff's complaint.

X.

Defendant denies the allegations contained in Paragraph X of plaintiff's complaint.

By way of reply to plaintiff's Supplemental Complaint filed herein, defendant denies and alleges as follows:

I.

Defendant denies the allegations contained in Paragraph I of plaintiff's supplemental complaint.

II.

Answering Paragraph II of plaintiff's supplemental complaint, defendant denies each and every material allegation contained therein.

III.

Defendant alleges that plaintiff's supplemental

complaint, filed herein on the 21st of April, 1949, alleges no facts material to the case occurring after the filing of the original complaint on April 8, 1949, as required by Sec. 55-5-82 ACLA 1949, and that the same should be dismissed for that reason.

Wherefore, defendant having fully answered the complaint and supplemental complaint filed herein by plaintiff, prays that the plaintiff take naught by reason thereof and that the same be dismissed with prejudice.

J. GERALD WILLIAMS,

Attorney General of Alaska.

Attorney for M. P. Mullaney, Commissioner of
Taxation, Defendant. [26]

United States of America,
Territory of Alaska—ss.

J. Gerald Williams, being first duly sworn on oath, deposes and says: That I am the Attorney General of the Territory of Alaska, and by virtue of my official position, as one of the attorneys for the defendant named in the above and foregoing Answer; that I make this verification for and on behalf of the defendant for the reason that the defendant is not presently at Juneau, Alaska, the place where this verification is made, nor within one hundred miles thereof; that I have read the foregoing Answer and know the contents thereof, and that the same is true, as I verily believe.

J. GERALD WILLIAMS.

Subscribed and sworn to before me this 3rd day of May, 1949.

[Seal] MARTHA WENDLING,
Notary Public for Alaska.

My commission expires Nov. 1, 1949.

Copy Received, May 3rd, 1949.

FRANK L. MECHEM and
H. L. FAULKNER,
Attorneys for Plaintiff.

Filed in the District Court, Territory of Alaska,
1st Division, at Juneau, May 3, 1949. [27]

[Title of District Court and Cause.]

PRELIMINARY INJUNCTION

This matter comes regularly before the Court upon the plaintiff's Complaint and Motion for a Preliminary Injunction, the plaintiff being represented by H. L. Faulkner and Frank L. Mechem, its attorneys, and the defendant being represented by J. Gerald Williams, Attorney General, and John Dimond, Assistant Attorney General, and the Court having read and considered said Complaint and the affidavits in support thereof and having received testimony in Open Court in support of the allegations in said Complaint, and having heard and considered the arguments and statements of counsel for the respective parties; now, upon motion of the plaintiff

It Is Ordered that M. P. Mullaney, Commissioner of Taxation of the Territory of Alaska and the defendant herein, be and he is hereby temporarily enjoined from collecting or attempting to collect by any manner whatsoever amounts withheld by plaintiff from the wages and salaries of its employees as a tax under Sections 5-B and 8 of the Alaska Net Income Tax Act of January 22, 1949, and the Alaska Net Income Tax Act of March 26, 1949, pending final decision of this Court with respect to the validity of the said tax and provisions of the said Acts; and It Is Further Ordered that plaintiff shall pay into Court to be held and impounded therein during the period of this Temporary Injunction and until final decision of the Court, all amounts withheld and required to be withheld by plaintiff from the wages and salaries of its employees who are residents of the Territory of Alaska; and that these amounts be paid to the Clerk of the Court to be so impounded, at such times as the law requires or at such extensions thereof as may be granted by the Tax Commissioner of the Territory of Alaska.

Done in Open Court this 28th day of April, 1949.

GEORGE W. FOLTA,

Judge.

Approved as to form:

J. GERALD WILLIAMS,

Attorney General.

Filed in the District Court, Territory of Alaska,
1st Division, at Juneau, April 28, 1949. [28]

No. 6069-A

OPINION

Filed June 24, 1949

Faulkner, Banfield & Boochever, of Juneau, Alaska, and Bogle, Bogle & Gates, of Seattle, Washington, for plaintiff.

J. Gerald Williams, Attorney General of Alaska, and John Dimond, Assistant Attorney General of Alaska, both of Juneau, Alaska, for defendant.

Ralph J. Rivers, of Juneau, Alaska, as Amicus Curiae.

The first income tax statute for the Territory was enacted on January 22, 1949, as Ch. 3 of the Extraordinary Session of the Legislature convened on January 6, 1949. Because doubt was entertained as to the validity of the composition of the Extraordinary Session, the Legislature which convened in regular session on January 27, 1949, re-enacted its provisions, adding one for the ratification of the tax withholdings already made under the original act, and this act became Ch. 115.

In this suit plaintiff challenges not only the validity of the Extraordinary Session, and consequently the validity of the original income tax statute and everything done in pursuance thereof on the ground that the membership thereof was composed of those who were elected in 1948 and 1946 instead of those elected in 1946 and 1944, whose terms had not expired until the regular session was convened, but also challenges the validity of Chapter 115 on the following grounds: (1) that the pro-

vision for the adoption of future [29] amendments of the Federal Income Tax Law and the regulations thereunder constitutes a delegation of legislative authority to Congress and the Commissioner of Internal Revenue; (2) that the act is lacking in uniformity because a tax on income, being a property tax, cannot be graduated; (3) that the act burdens interstate commerce in the constitutional sense; (4) that payment of the tax is made a condition precedent to the right to carry on any business, including that in interstate commerce; (5) that the formula prescribed for the apportionment of the wages of plaintiff's nonresident seamen is discriminatory because it has not, in express terms, been made applicable to other nonresident employees of the plaintiff; (6) that the statute is void for indefiniteness and uncertainty because it fails to define the terms "income" in Section 5 A (2) (a), "days in port" in the succeeding paragraph, and "continental shelf" in Section 5 B (1); (7) that the withholding provision, so far as seamen are concerned, is in conflict with Section 601, Title 46, U.S.C.A., and therefore void; (8) that Section 7 D of the statute delegates legislative authority to the Tax Commissioner.

Plaintiff operates steamships between the State of Washington and the Territory of Alaska, employing more than 700 seamen whose wages are paid at the end of each voyage in Seattle. In a suit against the plaintiff, filed in the Federal Court in Seattle, the Sailors' Union of the Pacific has ob-

tained an injunction, restraining the plaintiff from paying to defendant the tax withheld from the wages of its members under Chapters 3 and 115. Plaintiff asserts that similar suits by other maritime unions on behalf of those members who are employed by plaintiff have been forestalled only upon agreeing to similarly impound the tax withheld from their wages pending the outcome of this litigation. [30]

1. Validity of the Extraordinary Session.

Plaintiff contends "that the members of the Legislature elected at the general Territorial election in October, 1946, being required to take office on the fourth Monday in January, 1947, and having a term of two years fixed for the members of the House and four years for the members of the Senate, were entitled to hold office and to exercise the functions of legislators for two years and and four years, respectively, from the fourth Monday in January, 1947, and that therefore when the Extraordinary Session was called to convene on January 6, 1949, that session should have been composed of those members who were elected in 1946, and not those who were elected in 1948. However, those who were elected in 1948 were called, appeared, organized and attempted to function as a Legislature regularly called, and they passed the first income tax law, Chapter 3 of the Laws of the Extraordinary Session, 1949."

Although the Organic Act for the Territory (Act of August 24, 1912, 37 Stat. 513, 48 U.S.C.A. 67,

et seq.) prescribes the terms of members of the House and of the Senate at two and four years, respectively, it does not fix the time for the commencement thereof. However, it does provide, as it has provided ever since its enactment despite amendments, that immediately after assembling the members of the Senate shall, by lot or drawing, be divided into two classes; that the seats of the members of the first class shall be vacated at the end of two years and the seats of the members of the second class shall be vacated at the end of four years, Section 68 and 69a. The general election is held in October of the even-numbered years, and the Legislature is regularly convened on the fourth Monday in January of the odd-numbered years. 48 U.S.C.A. 74. The successful candidates, therefore, take their seats at the first regular session following their election.

It would, therefore, appear that the provision for vacating the seats of the members of the Senate at the end of two and four years, 48 U.S.C.A. 68 and 69a, referring as it does to the time of taking their seats upon assembling for the regular session, contemplates that the terms shall begin upon taking their seats. But if any doubt remains on this score, it would seem to be dispelled by the fact that since it cannot be known until after the determination by lot or drawing whose term shall be vacated at the end of two or four years, manifestly their terms cannot begin until such determination. If this is the correct view, then it follows that the terms of

the members who were elected in October, 1946, and of the long-term members elected in 1944, who took their seats on the fourth Monday of 1947, did not expire until the convening of the Legislature in regular session on January 27, 1949, and that they, instead of those elected in 1948 and 1946, respectively, who were called, should have composed the membership of the Extraordinary Session of the Legislature convened on January 6, 1949. It would likewise follow, if this view is correct, that the acts of the Legislature at its Extraordinary Session, including the enactment of the first income tax law and everything done pursuant thereto, were without authority and, hence, void.

Defendant contends that the terms began when the Canvassing Board issued the certificates of election under the Act of March 26, 1934, 48 Stat. 465, 48 U.S.C.A. 144a which provides, so far as is material to this controversy, that:

“The said canvassing board shall commence the performance of its duties at the office of [32] the Governor within ten days after the second Tuesday in October in each year in which an election is held, * * * and shall continue with such work from day to day until the same is completed. * * * In case it shall appear to the board that no election return, as herein prescribed, has been received by the Governor from any precinct in which an election has been held, the said board may accept in place thereof the certified copy of the certificate of election for such precinct received from the clerk of the court,

and may canvass and compile the same with the other election returns. The canvassing board shall terminate the canvass and issue the certificates of election so soon as it is satisfied that no missing return would, if received, change the result of a canvass based upon the returns at hand, but when the board has information that an election was held at any precinct from which no return has been received and which return, if received, the board has reason to believe will affect the result of the election, it shall be the duty of the board to await the arrival of such return until 4 o'clock postmeridian on the 10th day of December in the year during which the election is held, but no longer, and any return received after that time shall not be counted by the board.

“Upon the completion of the said canvass as herein provided, the said board shall declare the person who has received the greatest number of votes for the office for which he is a candidate elected to such office for the term for which he is elected, and shall issue and deliver to him in writing, under their hands and seals, a certificate of his election.”

It is clear that so far as terms are concerned, all that the Canvassing Board is empowered to do is to declare the term for which the successful candidate has been elected, not to fix the time for its commencement. That a definite time for the commencement of the terms of the members of the Legislature was intended is not only implicit in the provisions of the Organic Act already discussed, but

also is apparent upon general considerations. These lead to the conclusion that the terms of the members of the Legislature elected in 1946 began upon their assembling for the regular session on the fourth Monday of January, 1947, and taking the oath of office. *Farrelly v. Cole* (Kan.), 56 P. 492, 500. Further support for this conclusion may be found in the provision of Section 74, Title 48 U.S.C.A. [33]

“The Legislature of Alaska shall convene at the capitol at the city of Juneau, Alaska, on the fourth Monday in January in the year 1941 and on the fourth Monday in January every two years thereafter; but the said legislature shall not continue in session longer than sixty days in any two years unless again convened in extraordinary session by a proclamation of the Governor, which shall set forth the object thereof and give at least fifteen days’ notice in writing or by telegram or radiogram to each member of said legislature, and in such case shall not continue in session longer than thirty days. The Governor of Alaska is hereby authorized to convene the legislature in extraordinary session for a period not exceeding thirty days when requested to do so by the President of the United States, or when any public danger or necessity may require it. Apr. 18, 1940, c. 105, Sec. 1, 54 Stat. 111.”

Obviously, the word “again” in the foregoing provision would be rendered meaningless if any extraordinary session of the Legislature were called for a date subsequent to the issuance of the certi-

ificates of election but before the convening of the regular session, as was done in this instance.

Accordingly, it is my opinion that the Extraordinary Session was not constituted in accordance with law; that the original income tax statute enacted during the session was invalid and, therefore, that the tax withholdings made pursuant thereto were likewise invalid unless it was in the power of the Legislature to ratify them in accordance with Section 16 of the act. Whether this ratification provision of Section 16 may be given effect depends on whether the Legislature could have enacted the withholding provisions of Ch. 3. Manifestly, the invalidity which would preclude ratification must inhere in the act. If it merely goes to the composition of the Legislature, and the act is one within the legislative power, it would appear that it could be ratified. Whether the act, or at least the withholding provisions of the act if they are separable, were within the power of the Legislature, therefore, becomes the next subject [34] of inquiry.

2. Delegation of Legislative Functions to Congress and the Commissioner of Internal Revenue.

The tax levied under the act is upon the income tax payable to the United States under the Internal Revenue Code. This adoption of the provisions of the Federal Income Tax Laws and Regulations made pursuant thereto, would make possible the administration of the act at a minimum of cost with all the attendant benefits of uniformity. But, manifestly, the administration of the statute requires a

strict and immediate conformity with subsequent amendments of the Federal Law and Regulations. That the Legislature was fully cognizant of this requirement is attested by the provisions of Section 3 B that:

“Whenever the Internal Revenue Code is mentioned in this Act, the particular portions or provisions thereof, as now in effect or thereafter amended, which are referred to, shall be regarded as incorporated in this Act by such reference and shall have effect as though fully set forth herein.

“Whenever any portion of the Internal Revenue Code incorporated by reference as provided in Paragraph (1) of this subsection refers to rules and regulations promulgated by the United States Commissioner of Internal Revenue, or hereafter so promulgated, they shall be regarded as regulations promulgated by the Tax Commissioner under and in accord with the provisions of this Act, unless and until the Tax Commissioner promulgates specific regulations in lieu thereof conformable with this Act.”

It is this part of the statute which is attacked as an attempt to delegate legislative power to Congress and the Commissioner of Internal Revenue. It must be admitted, however, that there is no delegation of authority to Congress or the Commissioner of Internal Revenue in express terms. The act merely provides for the conformity pointed out which is necessary to its life. Nevertheless, the weight of numerical authority supports the position of plaintiff and [35] would, if deemed controlling, preclude the Territory from availing itself

of the advantages to be gained from adopting the Federal Law. *State v. Webber* (Fla.), 133 A. 738; *Florida Commission v. State*, 21 So. 2d 599; *Santee Mills v. Query* (S. C.), 115 S. E. 202; *Featherstone v. Norman* (Ga.), 153 S. E. 58; *In re Opinion of Justices* (Mass.), 133 N. E. 453.

Obviously, if the Territorial Legislature were in session continuously, it would be in a position to adopt immediately each amendment to the Federal Laws and Regulations. But since it convenes biennially for a session of sixty days only, there was no alternative but the one to which it resorted. However, *Ex parte Lasswell*, 36 P. 2d 678, cited by the plaintiff supports the defendant's contention. In that case a provision in the California Industrial Recovery Act which, as in the instant case, had adopted a Federal act, to the effect that when the Federal authorities had fixed a code for the operation of any industry, that code would automatically become the state code, was upheld as against the contention that it was an unconstitutional delegation of legislative power, pp. 684-7. I am inclined to agree with the reasoning of this decision, and in any event the objection is not available to the plaintiff because it is not shown that there has been any amendment of either the Federal law or regulations since the enactment of Chap. 115 and, hence, it is not perceived how the constitutional rights of the plaintiff could have been infringed. Cf. *Panama Refining Co. v. Ryan*, 293 U. S. 388.

3. Uniformity.

The objection that the statute is wanting in uniformity and, hence, offends the due process and equal protection clauses of the Fourteenth Amendment is predicated [36] upon the proposition that a tax on income is a property tax and cannot be graduated. In support of the proposition that it is a tax on property, *Pollock v. Farmers Loan and Trust Co.*, 157 U. S. 429, is cited. But aside from the fact that the Fourteenth amendment does not apply to the Territories, *South Puerto Rico Sugar Co. v. Buscaglia*, 154 F. 2d 96, 101; *Anderson v. Scholes*, 83 F. Supp. 681, 687; cf. *Haavik v. Alaska Packers Association*, 263 U. S. 510, it would appear, from what was said concerning the nature of a tax on income in *Brushaber v. Union Pacific R. R.*, 240 U. S. 1, 16-17, and *New York v. Graves*, 300 U. S. 308, 315, that the implications of the *Pollock* case were misunderstood. Moreover, inequalities of the kind pointed out are not sufficient to invalidate tax legislation. *Beers v. Glynn*, 211 U. S. 477; *St. Louis Land Co. v. Kansas City*, 241, U. S. 419, 429. And speculation of the kind indulged in as to hardship and injustice in hypothetical cases cannot be considered by the courts.

4. Burden of Interstate Commerce Formula Apportionment

The contention that the tax burdens interstate commerce in the constitutional sense is based on the fact that in hypothetical cases in which gross receipts (One of the factors of the formula set

forth in Section 5 A (1) (2) or apportioning income attributable to local activities) are derived wholly or nearly so from interstate commerce or outside activities, such as the sale of gold or salmon, and the components of the remaining factors are so negligible as to have little countervailing effect, the resulting fraction, so far as its numerator is concerned, makes the formula discriminatory to such an extent as to result in practical effect in imposing a burden on interstate commerce. The formula may be expressed as follows: [37]

$$\begin{array}{cccc} \text{Fed. Income} & \text{Local} & \text{Payroll} & \text{Tangible} \\ \text{Tax} & \text{Gross} & \text{in} & \text{Local} \\ \text{without} & \text{Receipts} & \text{Alaska} & \text{Property} \\ \text{Deduction of} & \times & \text{-----} & \times 10\% = \text{Tax} \\ \text{Alaska Tax} & \text{Gross Rec.} & \text{Payroll} & \text{Tangible} \\ & \text{Every-} & \text{Every-} & \text{Property} \\ & \text{where} & \text{where} & \text{Everywhere} \end{array}$$

However, not only are plaintiff's operations governed by another formula set forth in Section 5 A (2) (b) but specific provision is also made by Section 5 (2) (c) for cases in which either formula produces inequitable results. Moreover, since it is not shown that the plaintiff belongs to the class referred to in the hypothetical cases—a prerequisite to a consideration of the objection, *Hatch v. Reardon*, 204 U. S. 152, 160; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544; *Federation of Labor v. McAdory*, 325 U. S. 450, 463, it cannot be heard to object on this ground.

5. Condition Precedent

The objection that Section 12 C makes the payment of the tax a condition precedent to the right

to carry on any business, including that in interstate commerce, is not reasonably susceptible of such a construction. The forfeiture of the license, where one may be required under other statutes, is made one of the consequences of nonpayment of the tax, not a condition to engaging in business in the first instance. Obviously, a forfeiture could not be incurred until after engaging in the business and becoming delinquent. Cf. *Crutcher v. Kentucky*, 141 U. S. 47, 56-7; *International Textbook Co. v. Pigg*, 217 U. S. 91.

6. Formula

It is also objected that no formula has been prescribed for the apportionment of salaries and wages of plaintiff's [38] nonresident employees who perform services in the Territory for a few weeks each year. But such an objection is not available to an employer. *Mt. Timber Co. v. Washington*, 243 U. S. 219, 234; *Jeffrey Manufacturing Co. v. Blagg*, 235 U. S. 571; *Virginia Ry. v. Federation*, 300 U. S. 515, 558.

7. Indefiniteness and Uncertainty

The statute is attacked for indefiniteness and uncertainty because it fails to define the terms "income" in Section 5 A (2) (a), "days in port" in the succeeding paragraph, and "continental shelf" in Section 5 B (1).

The context in which the term "income" is used makes its meaning reasonably clear. As to the term "days in port," since precision is not required in an apportionment formula and vessels are rarely

in port except to discharge or receive passengers or freight, the term may be construed as meaning the time the vessels are moored to a wharf or pier. Cf. *Pierce Oil Co. v. Hopkins*, 264 U. S. 137. The term "continental shelf" would not appear to be any more indefinite than the term high seas or limits of territorial waters. "Continental shelf" is defined by lexicographers as that portion of the ocean floor adjacent to a continent, within the one hundred fathom curve. It was not shown whether this curve has been delineated on charts of the United States Coast and Geodetic Survey. If it has not, it is obvious that there would be no way of determining whether a vessel in some cases was beyond or within the one hundred fathom line. But since the act contains a separability provision in Section 15, the clause in which the term "continental shelf" is employed must be examined to determine whether it may be eliminated without affecting the remainder of the act. The section containing the term reads that: [39]

"The tax levied by this subsection shall apply to that portion of the voyage pay of vessel personnel of interstate carriers engaged in the Alaska trade which is earned in the waters of Alaska, including the waters over the continental shelf. The tax shall likewise apply to that portion of the pay earned in Alaska of the personnel of carriers operating vehicles or airplanes on land or in the air on routes to and from Alaska."

Clearly the term is separable. *El Paso and N. E.*

Ry. Co. v. Gutierrez, 215 U. S. 87, 95-7; Electric Bond and Shares v. Commission, 303 U. S. 419, 434; Watson v. Buck, 313 U. S. 387, 396-7. And moreover its elimination and the consequent restriction of the statute to operations in territorial waters would merely limit the operation of the statute within the conceded jurisdiction of the Territory.

8. Conflict with Federal Statutes Relating to Seamen

It is also urged that the statute, so far as it requires withholding of the tax from the wages of seamen, is in conflict with 46 U.S.C.A., 601 providing:

“No wages due or accruing to any seamen or apprentice shall be subject to attachment of arrestment from any court, and every payment of wages to a seaman or apprentice shall be valid in law, notwithstanding any previous sale or assignment of wages or of any attachment, encumbrance, or arrestment thereon; and no assignment or sale of wages or of salvage made prior to the accruing thereof shall bind the party making the same, except such allotments as are authorized by this title. This section shall apply to fishermen employed on fishing vessels as well as to seamen: Provided, that nothing contained in this or sections 80, 569, 596, 597, 599, 656, 673, 701, 703, 712, and 713 of this title shall interfere with the order by any court regarding the payment by any seamen of any part of his wages for the support and maintenance of his wife and minor children. Mar. 4, 1915, c. 153, Sec. 12, 38 Stat. 1169.”

and, hence, void. In support of this plaintiff cites *American Hawaiian Steamship Co. v. Fisher*, 82 F. Supp. 193. I am of the opinion, however, that there is no conflict between the two statutes. [40]

9. Delegation of Authority to Tax Commissioner

Section 7 D authorizes the Tax Commissioner to:

“Credit or refund all overpayments of taxes, all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that are found unjustly assessed or excessive in amount, or in any manner wrongfully collected. The tax Commissioner shall by means of rules and regulations specify the manner in which claims for credits or refunds shall be made, including adjustments with persons whose sole income in Alaska consists of wages or salary, prescribe limitations and give notice of allowance or disallowance. These rules and regulations shall be based upon the provisions of Secs. 321 and 322 of the Internal Revenue Code insofar as such provisions are consistent with other provisions of this Act. When refund is allowed to a taxpayer, same shall be paid out of the general fund on a Territorial warrant issued pursuant to a voucher approved by the Tax Commissioner.”

The plaintiff contends that this constitutes a delegation of legislative authority. The authority conferred would, however, appear to be within the test laid down in *Bowles v. Wallingham*, 321 U. S. 503, 512-14, in which the Administrator of the Office of Price Administration was empowered to fix maxi-

mum rents which, in his judgment, would be generally fair and equitable in any defense rental area whenever in his judgment that action was necessary or proper in order to effectuate the purposes of the act, and further empowered to make adjustments for such relevant factors as he may determine and deem to be of general applicability, and to provide for such adjustments and reasonable exceptions as in his judgment are necessary and proper in order to effectuate the purposes of the act.

Accordingly, it is my opinion that the act is valid, from which it follows that it was within the power of the Legislature convened in regular session on January 27, 1949, to ratify and validate what was done under the withholding provisions of Ch. 3, *People v. Fifer* (Ill.), 117 N. E. 790; *Board of Education v. Board of Commissioners* (N. C.), 111 S. E. 531, 532; *Anderson County Road Dist. v. Pollard* (Tex.), 296 S. W. 1062; *People v. Shriver* (Ill.), 76 N. E. 2d 38, 42; *Sutherland's Stat. Construction*, Section 2219. The complaint should, therefore, be dismissed.

/s/ GEORGE W. FOLTA,
Judge.

Filed June 24, 1949. [42]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above-entitled cause came on regularly for hearing on the 5th day of May, 1949, on the merits on the plaintiff's petition for an injunction before the Honorable George W. Folta, Judge of the above-entitled court. Plaintiff was represented by its counsel Frank L. Mechem of the firm of Bogle, Bogle and Gates of Seattle, Washington, and H. L. Faulkner of the firm of Faulkner, Banfield and Boochever of Juneau, Alaska; the defendant was represented by J. Gerald Williams, Attorney General of Alaska, and John H. Dimond, Assistant Attorney General of Alaska. Plaintiff having previously adduced oral testimony in support of its prayer for relief contained in its complaint and supplemental complaint, wherein plaintiff prayed for a preliminary injunction restraining defendant from doing any act or thing for the purpose of collecting from plaintiff any amount as income tax withheld from any employee of plaintiff pursuant to Sections 5B and 8 of the Alaska Net Income Tax Act and for an order adjudging and decreeing that said Alaska Net Income Tax Act is null and void and of no legal effect; and the court having considered said evidence and pleadings filed herein and having heard the arguments of counsel and having previously granted the preliminary injunction prayed for by plaintiff took said matter under advisement and on June 24, 1949, rendered its written opinion,

and said court does now in accordance therewith make and order entered the following [43]

FINDINGS OF FACT

I.

That Plaintiff, Alaska Steamship Company, is a corporation organized and existing under the laws of the State of Washington with its offices and principal places of business at Pier 42, Seattle, Washington. That Plaintiff is qualified to do business in the Territory of Alaska and has paid all taxes required by the Territory of Alaska as a condition of doing business and has filed its annual report for the last calendar year.

II.

That defendant is an officer of the Territory of Alaska, residing in Juneau, in said Territory, and can be found within said Territory of Alaska and has been and now is the Commissioner of Taxation for the Territory of Alaska, authorized by law to collect taxes for the Territory of Alaska and to enforce the Tax laws of the Territory.

III.

That this Action arises under the Act of March 26, 1949, designated as Alaska Net Income Tax Act.

IV.

That plaintiff is engaged in the operation of a line of vessels transporting freight and passengers between Seattle, Washington, and ports in Alaska,

and it was so engaged at all times mentioned in the complaint filed herein, and it is engaged in operating vessels in interstate commerce to and from Seattle, Washington, and all principal ports in the Territory of Alaska and to other points in Alaska including salmon canneries located therein. That in its Alaska trade said plaintiff was operating 12 vessels at all times and at other times operating more than 12 vessels in the Alaska trade; that it employes approximately 706 seamen who are non-residents of the Territory of Alaska and that at the time of the trial of this cause its operating schedule provides for 4 sailings a week from the port of Seattle to the Territory of Alaska.

V.

That approximately 75% of the time on the voyages of the plaintiff's vessels is spent in Territorial waters of Alaska and in waters off shore [44] from the coast of Alaska and that part of the voyages are made thru Canadian waters and part outside the 3 mile limit off the coast of Alaska.

VI.

That the seamen personnel belong to various Unions including the Sailors Union of the Pacific and all seamen aboard the vessels of plaintiff company including all deck crews are employed under union contracts and the seamen are paid off in Seattle at the end of each voyage and upon return of the vessel to Seattle and when payment is made the amount of pay due each man is computed according to the union scale and the union contract.

VII.

That under the provisions of the Alaska Net Income Tax Act plaintiff has deducted the sum of \$7,399.75 from the wages of seamen for the quarter ending March 31, 1949.

VIII.

That the United States District Court for the Western District of Washington, Northern Division, in the case of John E. Humes, Bob Dombroff and Sailors Union of the Pacific vs. the Alaska Steamship Company, by its preliminary injunctions issued in that cause on February 4 and April 4, 1949, ordered the plaintiff herein to withhold the Alaska Net Income Tax from the wages of its seamen and the personnel of its vessels and to place the amount so withheld in a special fund subject to the order of that court, and it enjoined this plaintiff, Alaska Steamship Company, from paying any portion thereof over to the defendant as tax commissioner of the Territory of Alaska.

IX.

That the plaintiff, Alaska Steamship Company, has nineteen resident Alaska employees who are agents, assistant agents and shore employees, and that the plaintiff, Alaska Steamship Company, withheld the Alaska tax from their wages from the period from January 1, 1949, until the end of the March quarter, and that the amount so withheld was \$2,319.96, and this has been impounded pursuant to the order of this Court.

X.

That the Tax Commissioner of the Territory of Alaska, the defendant herein, has made demand on the plaintiff for payment of the withholding tax under the Alaska Net Income Tax Act and plaintiff had no adequate remedy pending the decision in this case except by means of preliminary injunction which was issued by the Court herein.

XI.

That the extraordinary session of the Territorial legislature which convened on January 6, 1949, was composed of members who, with the exception of long term members elected in October, 1946, were elected in October, 1948, and whose terms would not commence until the convening of the legislature in regular session on January 27, 1949. That the terms of the members who were elected in October, 1946, and of the long term members elected in 1944 who took their seats on the 4th Monday of January, 1947, did not expire until the convening of the legislature in regular session on January 27, 1949, and that they should have composed the membership of the extraordinary session of the legislature which convened on January 6, 1949. That the Act of January 22, 1949, known as the Alaska Net Income Tax Act was invalid because the special session of the legislature of the Territory of Alaska which enacted said Act was not a lawfully constituted session of said legislature.

XII.

That the regular session of the 1949 Territorial Legislature re-enacted the Alaska Net Income Tax Act as Chapter 115, Session Laws of Alaska, 1949. That in accordance with Section 16 of said Chapter 115 the tax withholdings effectuated under the Alaska Net Income Tax Act as passed by the extraordinary session were ratified and confirmed.

XIII.

The term, "Continental Shelf," as it is used in Section 5B(1) of Chapter 115, Session Laws of Alaska, 1949, in the clause "including the waters over the Continental Shelf," although indefinite in its use may under the severability provision of Section 15 of the Act be eliminated without affecting the remainder of the Act.

XIV.

That the evidence and pleadings do not show that there has been any amendment of either the Federal Internal Revenue Code or the regulations [46] promulgated by the United States Commissioner of Internal Revenue since the enactment of Chapter 115, Session Laws of Alaska, 1949.

And, from the foregoing Findings of Fact, the Court does now make and enter the following

CONCLUSIONS OF LAW

I.

That the extraordinary session of the legislature which convened on January 6, 1949, was not constituted in accordance with law and that the pretended

income tax statute enacted during that session was invalid.

II.

That the tax withholdings made pursuant to Chapter 3 of the Extraordinary Session, referred to in the preceding paragraph are valid under the provisions of Section 16, Chapter 115, Session Laws of Alaska, 1949.

III.

That Chapter 115, Session Laws of Alaska, 1949, is a valid Act and that the temporary injunction granted herein on the 28th day of April, 1949, should be vacated and the complaint dismissed.

Plaintiff's exceptions are hereby allowed.

Done in Open Court at Juneau, Alaska, this 8th day of July, 1949.

/s/ GEO. W. FOLTA,
District Judge.

Filed in the District Court, Territory of Alaska,
1st Division, at Juneau, July 8, '49 P.M. [47]

In the District Court for the Territory of Alaska
Division Number One, at Juneau

No. 6069-A

ALASKA STEAMSHIP COMPANY,
a corporation,

Plaintiff,

vs.

M. P. MULLANEY, Commissioner of Taxation,
Territory of Alaska,

Defendant.

JUDGMENT AND DECREE

The above entitled cause came on regularly for hearing on the 5th day of May, 1949 on the merits on the plaintiff's petition for an injunction before the Honorable George W. Folta, Judge of the above entitled Court. Plaintiff was represented by its counsel Frank L. Mechem of the firm of Bogle, Bogle and Gates of Seattle, Washington and H. L. Faulkner of the firm of Faulkner, Banfield and Boochever of Juneau, Alaska; the defendant was represented by J. Gerald Williams, Attorney General of Alaska, and John H. Dimond, Assistant Attorney General of Alaska. Plaintiff having previously adduced oral testimony in support of its prayer for relief contained in its complaint and supplemental complaint, wherein plaintiff prayed for a preliminary injunction restraining defendant from doing any act or thing for the purpose of collecting from plaintiff any amount as income tax

withheld from any employee of plaintiff pursuant to Sections 5B and 8 of the Alaska Net Income Tax Act and for an order adjudging and decreeing that said Alaska Net Income Tax Act is null and void and of no legal effect; and the court having considered said evidence and pleadings filed herein and having heard the arguments of counsel and having previously granted the preliminary injunction prayed for by plaintiff, took said matter under advisement and on June 24, 1949 rendered its written opinion; and the Court being fully advised in the premises, having heretofore made and ordered entered its findings of fact and conclusions of law; now therefore, it is hereby [48]

Ordered, Adjudged and Decreed that Chapter 115, Session Laws of Alaska 1949 is a valid Act; and it is further

Ordered, Adjudged and Decreed that the preliminary injunction granted herein on the 28th day of April, 1949 be, and the same hereby is, vacated; and it is further

Ordered, Adjudged and Decreed that the complaint filed herein be, and the same hereby is, dismissed.

Plaintiff's exceptions are hereby allowed.

Done in open court at Juneau, Alaska, this 8th day of July, 1949.

/s/ GEO. W. FOLTA,
District Judge.

Filed and entered in the District Court, Territory of Alaska, 1st Division, at Juneau July 8, 1949. [49]

[Title of District Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL

The above named plaintiff, Alaska Steamship Company, a corporation, considering itself aggrieved by the Judgment and Decree made and entered in the above entitled court in this action on the 9th day of July, 1949, in favor of the defendant hereinabove named, and dismissing plaintiff's Complaint and dissolving the preliminary injunction, do hereby appeal from the Judgment and Decree of the above entitled court and the whole thereof, to the United States Court of Appeals for the Ninth Circuit at San Francisco, California, for the reasons specified and set forth in the Assignments of Error, which are filed herewith; and the plaintiff prays that this appeal may be allowed and that a transcript of the record, proceedings and papers, upon which the Judgment and Decree were made, duly authenticated by the Clerk of this Court, may be sent to the United States Court of Appeals for the Ninth Circuit at San Francisco, California.

Dated at Juneau, Alaska, the 9th day of July, 1949.

BOGLE, BOGLE & GATES,
FRANK L. MECHEM
FAULKNER, BANFIELD &
BOOCHEVER,
/s/ H. L. FAULKNER,
Attorneys for Plaintiff.

Copy received this 9th day of July, 1949.

J. GERALD WILLIAMS,
Attorney General, Territory
of Alaska,
Attorney for Defendant,
By JOHN H. DIMOND,
Of Counsel.

Filed in the District Court, Territory of Alaska,
1st Division, at Juneau, July 9, 1949. [50]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Comes now the above-named plaintiff and alleges that the Findings of Fact, Conclusions of Law and Decree of Judgment of the above-entitled Court entitled in this cause on the 8th day of July, 1949, are erroneous and unjust to plaintiff, and plaintiff files herewith its petition for allowance of appeal, the following Assignments of Error on which it will rely, namely:

I.

The Court erred in making and entering that portion of Finding No. XI, which reads as follows:

“That in accordance with Section 16 of said Chapter 115 the tax withholdings effectuated under the Alaska Net Income Tax Act as passed by the Extraordinary Session were ratified and confirmed.”

II.

The Court erred in holding that the delegation of legislative functions to Congress and the Commissioner of Internal Revenue and the Tax Commissioner of Alaska under the provisions of Chapter 115, Session Laws of Alaska, 1949, is a valid delegation of authority.

III.

The Court erred in holding that the tax levied under the provisions of Chapter 115, Session Laws of Alaska, 1949, is uniform in its application.

IV.

The Court erred in holding Chapter 115, Session Laws of Alaska, 1949, to be valid, thereby holding that the tax did not burden interstate commerce [51] and that the formula for apportioning the tax does not produce inequitable results.

V.

The Court erred in holding that the provision in Chapter 115, Session Laws of Alaska, 1949, providing for forfeiture of license in case of non-payment of the tax is valid.

VI.

The Court erred in holding that the provisions of the law for apportionment of the tax between that portion of a taxpayer's income earned in Alaska and the total income earned both within and without the Territory is valid.

VII.

The Court erred in making and entering Finding of Fact No. XIII, which reads as follows:

“The term, ‘Continental Shelf,’ as it is used in Section 5B (1) of Chapter 115, Session Laws of Alaska 1949 in the clause ‘including the waters over the Continental Shelf,’ although indefinite in its use may under the severability provision of Section 15 of the Act be eliminated without affecting the remainder of the Act.”

VIII.

The Court erred in holding that the tax levied under the Alaska Net Income Tax Law on the wages of seamen is valid.

IX.

The Court erred in making and entering its Conclusion of Law No. II, which read as follows:

“That the tax withholdings made pursuant to Chapter 3 of the Extraordinary Session, referred to in the preceding paragraph are valid under the provisions of Section 16, Chapter 115, Session Laws of Alaska 1949.”

X.

The Court erred in making and entering its Conclusion of Law No. III, which reads as follows:

“That Chapter 115, Session Laws of Alaska 1949 is a valid Act and that the temporary injunction granted herein on the 28th day of April, 1949 should be vacated and the complaint dismissed.” [52]

XI.

The Court erred in entering Judgment and De-

creed in favor of the defendant and dismissing the plaintiff's complaint and dissolving the Preliminary Injunction heretofore issued in this cause on April 28, 1949.

Wherefore, plaintiff prays that the Decree and Judgment and the Findings of Fact and Conclusions of Law upon which the Decree is based be set aside and the Preliminary Injunction heretofore issued on April 28, 1949, be made permanent.

Dated at Juneau, Alaska, this 9th day of July, 1949.

BOGLE, BOGLE & GATES,
FRANK L. MECHEM.
FAULKNER, BANFIELD &
BOOCHEVER,
H. L. FAULKNER

By /s/ H. L. FAULKNER,
Of Attorneys for Plaintiff.

Copy received this 9th day of July, 1949.

/s/ J. GERALD WILLIAMS,
Attorney General, Territory
of Alaska,
Attorney for Defendant.

By /s/ JOHN H. DIMOND,
Of Counsel.

Filed July 9, 1949. [53]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

This matter coming on regularly before the Court on this 9th day of July, 1949, upon the petition of plaintiff above named for the allowance of an appeal in behalf of plaintiff from the Findings of Fact, Conclusions of Law and Judgment and Decree entered in this cause on July 8, 1949, and the plaintiff having filed its Assignments of Error,

Now, Therefore, It Is Ordered that the appeal of the plaintiff from the Findings of Fact, Conclusions of Law and Judgment and Decree entered herein on July 8, 1949.

Be And It Is Hereby Allowed to the United States Court of Appeals for the Ninth Circuit; and that a certified copy of the transcript of record, orders and all proceedings in this cause on which the Findings of Facts, Conclusions of Law and Judgment and Decree appealed from are based, be transferred, duly authenticated, to the United States Court of Appeals for the Ninth Circuit and therein filed, and the cause docketed on or before forty days from this date, to be heard before the Court at San Francisco, California, or such other place within the Ninth Circuit as may be designated.

It Is Further Ordered that the plaintiff herein file its cost bond on appeal in the sum of \$250.00, with surety to be approved by the Court or the Clerk thereof.

Done In Open Court this 9th day of July, 1949.

/s/ GEO. W. FOLTA,
District Judge.

Copy received July 9, 1949.

J. GERALD WILLIAMS,
Attorney General of Alaska,
Attorney for Defendant.

By JOHN H. DIMOND,
Of Counsel.

Filed and Entered July 9, 1949. [54]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents:

That we, Alaska Steamship Company, a corporation, the plaintiff above named, as Principal, and the General Casualty Company of America, a corporation, authorized to transact surety business in the Territory of Alaska as Surety, are held and firmly bound unto the above named M. P. Mullaney, Tax Commissioner of the Territory of Alaska, the above named defendant, and his successors in office, for the benefit and indemnity of whom it may concern, in the penal sum of Two Hundred Fifty and no/100 (\$250.00) Dollars, to be paid to the said M. P. Mullaney, the defendant above named, his successors or assigns, and for the benefit and indemnity of whom it may concern, for which payment well

and truly to be made we bind ourselves and our successors and assigns jointly and severally, firmly by these presents.

Sealed with our seals and dated this 9th day of July, 1949.

Whereas, on the 9th day of July, 1949, in a suit pending in the District Court for the Territory of Alaska, First Judicial Division, between the plaintiff and the defendant above named, a judgment was rendered in favor of the defendant and against the plaintiff, in which plaintiff's Complaint was dismissed; and the plaintiff has petitioned for and been allowed by the Court an appeal to the United States Court of Appeals for the Ninth Circuit, and a citation has been issued and directed to the defendant above named, citing him to appear in that court at San Francisco, California, within thirty days from and after the date of the citation;

Now, Therefore, The Condition Of This Obligation Is Such that if the plaintiff above named and the principal hereon shall prosecute its appeal to effect [55] and answer all costs, if the appeal be dismissed, or if it be affirmed by judgment of the appellate court, and all such costs as the appellate court may award, if the judgment should be modi-

fied, then this obligation to be void, otherwise to remain in full force and effect.

ALASKA STEAMSHIP
COMPANY,

a corporation,

By H. L. FAULKNER,

Its Attorney.

Principal:

GENERAL CASUALTY
COMPANY OF AMERICA,

a corporation, Surety,

[Seal] By STANLEY GRUMMETT,
Attorney-in-fact.

Copy received this 9th day of July, 1949.

J. GERALD WILLIAMS,

Attorney General, Territory
of Alaska,

Attorney for Defendant.

By JOHN H. DIMOND,

Of Counsel.

Approved July 9, 1949:

GEORGE W. FOLTA,

U. S. Dist. Judge. [56]

Filed in the District Court, Territory of Alaska,
1st Division, at Juneau, July 9, 1949.

[Title of District Court and Cause.]

CITATION ON APPEAL

The President of The United States of America:

To the above-named M. P. Mullaney, Commissioner of Taxation, Territory of Alaska, the defendant, and to J. Gerald Williams, Attorney General of the Territory of Alaska, and John Dimond, Assistant Attorney General, Attorneys for defendant:

Greeting: You are hereby cited and admonished to be and appear in the United States Court of Appeals for the Ninth Circuit, to be holden in the city of San Francisco, State of California, or at such other place within the Ninth Circuit as may be designated by the Court, within forty days from the date of this Citation, pursuant to an Order allowing an Appeal made and entered in the above-entitled action on this day, in which Appeal the above-named plaintiff is the Appellant, and the above-named defendant is the Appellee, to show cause, if any there be, why the Judgment and Decree rendered in the above-numbered cause on the 8th day of July, 1949, in favor of the defendant and against the plaintiff, the Appellant herein, should not be corrected, set aside and reversed and why speedy justice should not be done to the plaintiff, the Appellant herein, in that behalf.

Witness the Hon. Fred M. Vinson, Chief Justice of the Supreme Court of the United States of America, on this 9th day of July, the year One

Thousand Nine Hundred and Forty-Nine, and of our independence, the One Hundred and Seventy-Third. [57]

Witness my hand and the seal of the above-named District Court on the 9th day of July, 1949.

/s/ GEORGE W. FOLTA,
District Judge.

Copy received this 9th day of July, 1949.

/s/ J. GERALD WILLIAMS,
Attorney General, Territory
of Alaska,
Attorney for Defendant.

By /s/ JOHN H. DIMOND,
Of Counsel.

Filed July 9, 1949. [58]

[Title of District Court and Cause.]

STIPULATION RE PRINTING OF RECORD

It Is Hereby Stipulated by and between the parties above named, through their respective attorneys, that in printing the papers and records to be used in the hearing on appeal in the above entitled cause, before the U. S. Court of Appeals for the Ninth Circuit, the title of the court and cause in full shall be omitted from all papers except on the first page of the record and that there shall be inserted in place of the title on all papers used as a part of the record the words "Title of Court and

Cause"; also that all endorsements on all papers used as a part of the record may be omitted except the clerk's filing marks and admission of service.

Dated at Juneau, Alaska, the 9th day of July, 1949.

BOGLE, BOGLE & GATES,
FRANK L. MECHEM,
FAULKNER, BANFIELD &
BOOCHEVER,
H. L. FAULKNER,

By /s/ H. L. FAULKNER

Attorneys for Plaintiff.

J. GERALD WILLIAMS,
Attorney for Defendant,

By /s/ JOHN H. DIMOND,
Of Counsel.

[Endorsed]: Filed July 9, 1949. [59]

In the District Court for the Territory of Alaska,
Division Number One, at Juneau

No. 6069-A

ALASKA STEAMSHIP COMPANY, a corporation,
tion,

Plaintiff,

vs.

M. P. MULLANEY, Commissioner of Taxation,
Territory of Alaska,

Defendant.

REPORTER'S TRANSCRIPT OF RECORD

Be It Remembered, that on the 22nd day of April, 1949, at 2:30 o'clock p.m., at Juneau, Alaska, the above-entitled cause came on for hearing, the Honorable George W. Folta, District Judge, presiding; the plaintiff appearing by H. L. Faulkner and Frank L. Mechem, of its attorneys; the defendant appearing in person and by John Dimond, Assistant Territorial Attorney General;

Whereupon, the following occurred:

Mr. Faulkner: Before we proceed to take the testimony of Mr. McCarthy I think perhaps the Attorney General will stipulate that the Alaska Steamship Company is a corporation authorized to do business in the Territory and has complied with all the laws and payment of corporation taxes and filed its reports to date.

Mr. Dimond: It is so stipulated. [61]

The Court: The record may show that it is so stipulated.

WILLIAM PAUL McCARTHY

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Mechem:

Q. Will you state your full name?

A. William Paul McCarthy.

Q. What is your residence, Mr. McCarthy?

A. Seattle, Washington.

Q. And what is your occupation?

A. I am Assistant Treasurer and Auditor of the Alaska Steamship Company.

Q. You are, as I understand it, the Chief Auditor?
A. That is correct.

Q. How long have you served in that capacity with the company?
A. Four years.

Q. And you have been with the company for some time prior to that?

A. Twenty-three years.

Q. Will you describe the nature of your duties as Assistant Treasurer and Chief Auditor of the company with particular reference to payrolls and payroll taxes?

A. All records pertaining to payrolls and payroll taxes are [62] under my supervision, and any amounts withheld from the employees' payrolls, those records are also under my supervision.

Q. And does that include withholdings under the Federal Income Tax Law?
A. It does.

Q. And does it include withholdings under the Alaska Income Tax Law?
A. It does.

(Testimony of William Paul McCarthy.)

Q. Are you generally familiar, Mr. McCarthy, with all of the operations of the Alaska Steamship Company? A. I am.

Q. And let me ask you if you are the W. P. McCarthy who gave affidavits in support of the complaint filed by the Alaska Steamship Company in this matter? A. I am.

Q. Will you state the nature of the operations of the Alaska Steamship Company so far as it includes the Territory of Alaska, how they operate and where?

A. We operate—the Alaska Steamship Company operates vessels in interstate commerce from Seattle, Washington, to and from all principal ports in Alaska and within Alaska.

Q. And in addition to the principal ports do you operate to outports and canneries?

A. That is correct; when business warrants. [63]

Q. How many vessels does the company operate in the Alaska trade at the present time?

A. Twelve.

Q. And do you know how many seamen are employed by the company in that operation?

A. That would approximate 706.

Q. And do you know whether those seamen are residents or non-residents of the Territory of Alaska? A. They are non-residents.

Q. Based on the present operating schedules of the company, approximately how many sailings per week does the company have in the Alaska trade?

(Testimony of William Paul McCarthy.)

A. Presently that would approximate four sailings a week.

Q. That is four sailings from Seattle a week?

A. Yes, sir.

Q. And those are round-trip sailings, so that the vessels average four departures from Seattle each week and ultimately return to Seattle at the conclusion of the voyages?

A. That is correct.

Q. Mr. McCarthy, have you made a study to determine what portion of the actual voyages of these vessels occur in the territorial waters of Alaska?

A. I have.

Q. And based upon your study, what percentage—I am just asking you for an average to cover all these things—what [64] percentage would you say it involves, operations within the territorial waters?

A. In my opinion it would amount to about 75%.

Q. Now, will you describe the method or the procedure followed by the Alaska Steamship Company in employing these seamen who operate these vessels in the Alaska trade; in other words, will you describe how they are employed and under what arrangements?

A. At the beginning of each voyage there is a contract between the seamen and the master of the vessels wherein it is agreed that the vessels will sail to certain areas in Alaskan waters and return to a United States port, and in these articles of agree-

(Testimony of William Paul McCarthy.)

ment there is stated the amount of wages that will be paid these individual seamen for their employment.

Q. And are those agreements entered into, or do you know, Mr. McCarthy, whether those agreements are entered into with the various unions to which these seamen belong, whether the contracts are negotiated on a union basis? A. They are.

Q. Now, when are the seamen paid off who are employed under these contracts which you have described?

A. They are paid off upon the termination of the vessel's voyage, which termination usually happens after the vessel's return to Seattle, Washington, and the cargo of the vessel [65] has been discharged.

Q. And in paying off the seamen, the vessel's personnel, what kind of arrangement do you have for the determining of the amount of wages and the amount of withholdings and so forth?

A. We give each individual seaman a statement of account, or a wage account, which shows among other things the total number of days that he is employed aboard the vessel or for the voyage and his overtime, the amounts he has earned in excess of the union agreements, and then from that total is deducted the applicable withholding for Federal Income Tax, and also Federal Old Age Benefit, and also the Alaska Net Income Tax.

Q. There was attached to your affidavit, Mr.

(Testimony of William Paul McCarthy.)

McCarthy, and marked Exhibit A, a copy of a wage statement form which was designated as "Seamen's Statement of Account." Is that the wage statement you have just referred to?

A. That is the one I described.

Mr. Mechem: At this time, if the Court please, I should like to offer the "Seaman's Statement of Account" which is attached to the witness' affidavit filed in support of the complaint. I should like to offer that in evidence at this time.

The Court: It may be admitted and marked Plaintiff's Exhibit No. 1. [66]

Clerk of Court: The exhibit has been marked Plaintiff's Exhibit No. 1.

Q. Mr. McCarthy, can you state whether the Alaska Steamship Company did withhold on account of Alaska Income Tax from the wages paid to seamen during the first quarter of 1949?

A. They did.

Q. And can you state the amount which was so withheld? A. \$7,399.75.

Q. And can you state whether the company has continued to withhold on seamen's wages since the close of the first quarter of 1949?

A. The company has.

Q. And is it still withholding at the required rate upon seamen's voyage pay or wages at this time? A. Yes, sir.

Mr. Mechem: As it is material to the witness' testimony at this point, your Honor, I should like

(Testimony of William Paul McCarthy.)

to offer in evidence certified copies of two preliminary injunctions, an original and a supplemental preliminary injunction, issued by the United States District Court for the Western District of Washington—Northern Division, in the case of John E. Humes, Bob Dombroff and Sailors' Union of the Pacific against Alaska Steamship Company, being cause No. 2192. Certified copies of both of those orders were made a part of the complaint in this proceeding and are a part of the file in this Court. I should [67] like to offer them in evidence at this time.

The Court: Any objection?

Mr. Dimond: No objection.

The Court: They may be admitted and marked Plaintiff's Exhibits 2 and 3.

Q. Mr. McCarthy, are you familiar with the requirements of the two injunctions issued in the case of Humes, et al. against Alaska Steamship Company, to which I have just made reference and which have been admitted in evidence in this case?

A. I am.

Q. Will you state what those injunctions require the Alaska Steamship Company to do with respect to the amounts withheld from the voyage pay or wages of members of the Sailors' Union of the Pacific on account of Alaska Income Tax?

A. It requires that those withheld amounts be placed in a special fund in a depository and, further, that these funds cannot be withdrawn by the

(Testimony of William Paul McCarthy.)

company. It also restricts the company from paying over these withheld funds to the Territory of Alaska.

Q. So that at the present time if the company made any payment, of any of the amounts withheld, over to the Territory of Alaska, it would do so in violation of the terms of those injunctions?

A. That is correct. [68]

Q. Have the withheld amounts been placed in a special fund, and are they at the present deposited in a special fund, as provided by the two injunctions? A. They have been.

Q. Mr. McCarthy, what employees, if any, does the Alaska Steamship Company have in the Territory of Alaska aside from the seamen that we have been referring to?

A. They have agents and assistant agents and office employees.

Q. How many such employees, if you know, does the company have in the Territory?

A. Nineteen.

Q. And has the company been withholding upon their wages in accordance with the requirements of the Alaska Income Tax Law?

A. The company has.

Q. Are these employees residents of the Territory of Alaska or are they non-residents?

A. They would be considered residents.

Q. Now, does the Alaska Steamship Company have employees, other than the seamen to whom we

(Testimony of William Paul McCarthy.)

have referred and the nineteen resident employees in the Territory of Alaska, who may upon occasions perform services for the company in the Territory of Alaska? A. It has.

Q. And can you state whether those employees are residents or [69] non-residents of the Territory of Alaska?

A. They are non-residents.

Q. Do they mostly reside in Seattle, Mr. McCarthy? A. They do.

Q. Have any such employees performed services for the Alaska Steamship Company in the Territory of Alaska during the year 1949?

A. They have.

Q. Have any of them been here for substantial periods of time?

A. The most, I believe, would be about three to five weeks.

Q. And in your opinion are they likely to be required to spend substantial additional time in the Territory for the company for the year 1949?

A. I believe that they will be.

Q. Going back to the amount of \$7,399.75, which you stated had been withheld for the first quarter of 1949 from seamen's wages on account of the Alaska Income Tax Law, what part of that \$7,399.75 was withheld while the Act of January 22, 1949, sometimes referred to as the First Alaska Income Tax Law, was in effect, if you know?

A. All but approximately \$125.00 of the \$7,399.75.

(Testimony of William Paul McCarthy.)

Q. And the other \$125.00 was withheld under the Act of March 26, 1949? A. It was.

Q. Now, going to the employees of the Alaska Steamship Company [70] other than the seamen—that is, the 19 resident employees in the Territory who are not seamen and the employees who are resident in Seattle who perform services in the Territory for the company—do you know the amount of Alaska Income Tax withheld from the wages of those employees during the first quarter of 1949?

A. I do.

Q. Would you state the amount please?

A. \$2,319.96.

Q. How much of that amount was withheld under the Act of January 22, 1949?

A. All of it.

Q. Mr. McCarthy, it has been pointed out in the course of your testimony that the two injunctions, which were issued by the Federal District Court sitting in Seattle, were issued pursuant to an action brought by the Sailors' Union of the Pacific. Can you state and do you know the basis upon which the Alaska Steamship Company has withheld Alaska Income Tax from the voyage wages or voyage pay of seamen serving on the Alaska Steamship Company's vessels who are not members of the Sailors' Union of the Pacific?

A. That was by agreement of the various other unions and the legal department of the Alaska Steamship Company, because these other unions

(Testimony of William Paul McCarthy.)

threatened that they would instigate the same type of injunction that was issued in the Humes [71] case if this were not done.

Q. So that, as I understand you, the company was then left with no alternative other than to agree with the other unions that they would receive the same treatment, so far as the company is concerned, as the Sailors' Union of the Pacific reserved under the two injunctions issued by the Federal District Court in the suit brought by them?

A. That is correct.

Q. Do you know, Mr. McCarthy, whether the unions, the seamen's unions—I am speaking of them in the aggregate now, all of the unions to which these seamen belong, these 706 seamen—do you know whether those unions have made any threats to strike or to refuse to operate the company's vessels unless the company did certain things; do you know whether there were any such threats made?

A. I have heard that, but it has never been made to me.

Q. Now, the amounts which you have withheld on the wages of seamen other than members of the Sailors' Union of the Pacific, have they been placed in this same special fund that you referred to?

A. They have.

Q. Has the company received from the defendant in this action, the Commissioner of Taxation for the Territory of Alaska, any forms or instructions relative to the payment of these withheld amounts over to the Territory of Alaska? [72]

(Testimony of William Paul McCarthy.)

A. The company has.

Q. What, as you understand it, is the company required to do in that connection?

A. We are required to pay the amounts withheld for the first quarter of 1949 to the Tax Commissioner on or before April 30, 1949, the amounts withheld from the seamen's wages.

Q. And does that also require you to pay over to the Territory on or before April 30th the amounts withheld from the wages of company employees other than seamen?

A. That is right.

Q. Has the company filed these returns?

A. No, sir.

Q. Has it paid over to the Territory any of the withheld tax on wages of its employees, including seamen?

A. No, sir.

Q. Have you, Mr. McCarthy, had any occasion to examine the Alaska Income Tax Law for the purpose of ascertaining how the Alaska Steamship Company, as an operating company, would be required to determine its own income tax liability to the Territory of Alaska?

A. I have.

Q. Does the Alaska Income Tax Law provide any method by which the Alaska Steamship Company could allocate its Federal Income Tax in such a manner that it would not be required to pay Alaska Income Tax based upon the entire amount of [73] its Federal Income Tax?

A. It does.

(Testimony of William Paul McCarthy.)

Q. That is what we refer to as the allocation formula of the Alaska Income Tax Law?

A. Yes.

The Court: I didn't quite get that previous question. What was that?

Court Reporter: "Does the Alaska Income Tax Law provide any method by which the Alaska Steamship Company could allocate its Federal Income Tax in such a manner that it would not be required to pay Alaska Income Tax based upon the entire amount of its Federal Income Tax?"

A. "It does."

Q. Have you made any attempt, Mr. McCarthy, to determine what percentage figure the allocation formula in the Alaska Income Tax Law would be applied against the Federal Income Tax of the Alaska Steamship Company in arriving at the tax base for the Alaska Steamship Company under the Alaska Income Tax Law?

A. I have made a study based on the 1948 operations of the company.

Q. And based upon those operations what percentage, according to the allocation formula in the Alaska Law, what percentage of the total amount of Federal Income Tax would be subject to the Alaska Income Tax?

A. Approximately 45%. [74]

Q. So that, as I understand you, to arrive at the amount of Alaska Income Tax which the company would be required to pay over to the Territory as

(Testimony of William Paul McCarthy.)

its own Territorial Income Tax, it would take 45% of its total Federal Income Tax and then pay to the Territory 10% of that amount?

A. That is correct.

Q. Is the Alaska Steamship Company, as far as you know, if you know, planning to continue to operate throughout the year 1949 as it is operating presently?

A. The company will operate more fully than it is at the present.

Q. That is to say, they will make more voyages, more trips in the territorial waters of Alaska?

A. We will operate more vessels and, naturally that would follow, there would be more voyages.

Mr. Mechem: That is all, your Honor.

Cross-Examination

By Mr. Dimond:

Q. Mr. McCarthy, do you have separate accounts distinguishing between operations in Alaska and "Outside," separate profit and loss statements?

A. No, sir.

Q. In other words, the 45% is determined by means of the allocation formula, from that? [75]

A. That is right.

Q. Mr. McCarthy, I don't remember whether you said—did you withhold the Alaska Income Tax from the wages of the employees who were temporarily in Alaska for four or five weeks?

A. I have.

(Testimony of William Paul McCarthy.)

Q. When the seamen sign articles of agreement with the company is there a contract between the seamen and the company as to withholding Federal Taxes?

A. No, sir. Of Federal Taxes, no; that is not mentioned in the contract.

Mr. Dimond: No more questions.

(Witness excused.)

Thereafter, on the 29th day of April, 1949, the following stipulation in writing was filed in the above-entitled cause:

“Stipulation Re Introduction of Evidence
on Behalf of Plaintiff.”

No. 6069-A

“It is hereby stipulated and agreed between the respective parties hereto acting through and by their attorneys, that the Canvassing Board of the Territory of Alaska, after the territorial election of October 8, 1946, and on December 19, 1946, issued certificates of election to those members of the House and the Senate of Alaska, who were elected at the October, 1946, election, certifying that they were elected [76] ‘for the term beginning January 27, 1947’; and that on December 1, 1948, the same Canvassing Board issued certificates of election to those members of the House and Senate of Alaska who were elected on October 12, 1948, and that the certificates issued on December 1, 1948, to those

members who were elected in October, 1948, certified that they were elected to the legislature 'for a term of two years as provided by law, and four years as provided by law' respectively.

“Dated At Juneau, Alaska, April 28th, 1949.”

BOGLE, BOGLE & GATES,
FAULKNER, BANFIELD
& BOOCHEVER,
Attorneys for Plaintiff.

(Filing stamp)

/s/ J. GERALD WILLIAMS,
Attorney General of Alaska,
Attorney for Defendant.

[Endorsed]: Filed July 9, 1949.

Thereafter, on the 5th day of May, 1949, at 10:00 o'clock, a.m., at Juneau, Alaska, the above-entitled cause came on for further hearing, the Honorable George W. Folta, District Judge, presiding; the plaintiff appearing by H. L. Faulkner and Frank L. Mechem, of its attorneys; the defendant appearing by J. Gerald Williams, Attorney General of Alaska, and John Dimond, Assistant Attorney General of Alaska;

Whereupon, the following occurred:

Mr. Faulkner: It is stipulated that the Extraordinary [77] Session of the Territorial Legislature called to meet on January 6, 1949, and which passed the Alaska Net Income Tax Law, Chapter 3 of the

Session Laws of the Extraordinary Session of 1949, was composed of those members of the Territorial House and Senate who were elected at the regular Territorial election in October, 1948; that the call for the Extraordinary Session was issued by the Governor on December 17, 1948, and it was issued and sent to the members of the House and Senate who had been elected at the October, 1948, election; that the certificates of the Secretary of Alaska certifying the names of the members of the House and Senate who met in Extraordinary Session on January 6, 1949, were issued by the Secretary of Alaska on December 22, 1948, and they contained the names of the members of the House and Senate respectively, who had been elected at the election held in October, 1948, and those, together with the holdover members of the Senate, were the members who composed the Extraordinary Session of the Legislature held from January 6, 1949, until and including January 22, 1949, and that they passed the Alaska Net Income Tax Law, which was approved on January 22, 1949. I understand that is stipulated?

Mr. Williams: It is so stipulated.

Mr. Faulkner: We have subpoenaed the Secretary of Alaska, and that will obviate the necessity of his testimony with the original records.

(End of Record.) [78]

United States of America,
Territory of Alaska—ss.

I, Mildred K. Maynard, Official Court Reporter for the hereinabove entitled court, do hereby certify:

That as such Official Court Reporter I reported the above-entitled cause, viz. Alaska Steamship Company, a corporation, Plaintiff, vs. M. P. Mullaney, Commissioner of Taxation, Territory of Alaska, Defendant, No. 6069-A of the files of said court;

That I reported said cause in shorthand and myself transcribed said shorthand notes and reduced the same to typewriting;

That the foregoing pages numbered 1 to 18, both inclusive, contain a true and correct transcript of all the testimony at the hearing of the above-entitled cause and the stipulations entered into between the respective parties on the dates hereinbefore specified, to the best of my ability.

Witness my signature this 9th day of July, 1949.

/s/ MILDRED K. MAYNARD,
Official Court Reporter,
U. S. District Court,
First Division, Territory of
Alaska. [79]

[Title of District Court and Cause.]

ORDER SETTLING AND ALLOWING THE
BILL OF EXCEPTIONS

Be It Remembered that on this 9th day of July, 1949, the matter of settling the Bill of Exceptions in the above-entitled cause came on regularly for hearing and the Judge of the above-entitled Court being duly advised in the premises,

It Is Hereby Ordered, Adjudged and Certified as to the Bill of Exceptions, consisting of 19 pages, as follows, to wit:

a. That the Bill of Exceptions has been filed, allowed and certified within the time required by law, and the rules of this Court,

b. That it contains the complete transcript of testimony and evidence before the Court on the trial of this cause, including facts stipulated; that it sets forth the rulings of the Court upon all motions for introduction of evidence; all the oral and documentary evidence given upon the trial of the cause which is necessary to clearly present the questions of law involving the rulings to which errors were assigned in the Assignment of Errors heretofore filed in this cause,

c. That the Bill of Exceptions is hereby settled, allowed and cited as the true and correct Bill of Exceptions of all matters and things therein contained,

d. That the Bill of Exceptions is hereby made a part of the record of this cause,

e. That this Order constitutes the Judge's certificate to the Bill of Exceptions and that it be placed by the Clerk of this Court at the end of the Bill of Exceptions and attached to it as a part thereof.

Done in open Court this 9th day of July, 1949, at Juneau, Alaska.

/s/ GEO W. FOLTA,
District Judge.

Copy received this 9th day of July, 1949.

J. GERALD WILLIAMS,
Attorney General, Territory of Alaska, Attorney
for Defendant.

By /s/ JOHN H. DIMOND,
Of Counsel.

[Endorsed]: Filed and Entered July 9, 1949. [80]

[Title of District Court and Cause.]

PRELIMINARY INJUNCTION PENDING
APPEAL

This matter came on regularly before the Court upon plaintiff's application for continuance of Temporary Injunction pending appeal to the U. S. Court of Appeals, and Plaintiff being represented by its attorney, H. L. Faulkner, and defendant by J. Gerald Williams, Attorney General, and John Dimond, Assistant Attorney General of Alaska, and the Court having read and considered the application and petition of plaintiff for a Preliminary Injunction

pending the appeal, and having considered the records and files herein and the certified copy of the Temporary Injunction issued by the District Court of the Western District of Washington, Northern Division, on February 4, 1949, in the case of John H. Humes, Bob Dombroff and Sailors Union of the Pacific vs. Alaska Steamship Company, No. 2192, and the Supplemental Injunction issued by the Court on April 4, 1949, in which Preliminary Injunction and Supplemental Injunction, plaintiff is ordered to withhold the amount of the Alaska Income Tax from wages of its seamen and vessel personnel and place the withholdings in a separate fund to be designated "Alaska Withholding Fund" and by the terms of which Preliminary Injunction and Supplemental Injunction the plaintiff herein is enjoined from paying over to the defendant as Tax Commissioner of the Territory of Alaska any portion of the taxes withheld from its employees; and it appearing that the Preliminary Injunction and Supplemental Injunction heretofore mentioned are still in force. It further appearing that in the above-entitled cause pending in this court a judgment has been entered in favor of defendant and dissolving the Preliminary Injunction issued by this Court on April 28, and that plaintiff is left without any adequate remedy and will suffer irreparable injury pending the appeal of this cause to the U. S. Court of Appeals for the Ninth Circuit, unless protected by order of this Court,

It Is Ordered that M. P. Mullaney, Commis-

sioner of Taxation of the Territory of Alaska, the defendant herein, be and he is hereby temporarily enjoined from collecting or attempting to collect in any manner whatsoever amounts withheld by plaintiff from wages and salaries of its seamen employees as a tax under the provisions of the Alaska Net Income Tax Laws of January 22, 1949, and March 26, 1949, pending the final determination and final decision of the U. S. Court of Appeals upon the appeal of plaintiff from the judgment of this Court, and

It Is Further Ordered that plaintiff continue to collect the withholding taxes from its employees in accordance with the provisions of the Act of the Legislature of Alaska of March 26, 1949, known as the Alaska Net Income Tax Act and that pending the appeal the plaintiff pay all amounts of the tax on the wages of plaintiff's seamen employees and vessel personnel accruing under the provisions of the act of the Legislature of Alaska of March 26, 1949, into the Alaska Withholding Fund already established by the orders of the District Court of the Western District of Washington, Northern Division, hereinabove mentioned.

This injunction does not apply to tax on resident employees of plaintiff-appellant, and the Clerk is ordered to refund to the plaintiff, the amount of the tax heretofore paid him by plaintiff, and impounded under the provisions of the Temporary Injunction of April 28, 1949.

Done in open Court this 9th day of July, 1949.

/s/ GEO. W. FOLTA,

District Judge.

Copy received this 9th day of July, 1949.

/s/ J. GERALD WILLIAMS,

Attorney General, Territory of Alaska, Attorney for
Defendant.

[Endorsed]: Filed July 9, 1949. [82]

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT
OF RECORD

To J. W. Leivers, Clerk of the Above-Entitled
Court:

You will please prepare transcript of record in the above-entitled cause to be filed in the Office of the Clerk of the United States Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, upon appeal heretofore perfected in the Court, and include therein the following described papers and records, to wit:

1. Plaintiff's Complaint for Injunction and other relief, and exhibits thereto.
2. Plaintiff's Supplemental Complaint and exhibits thereto.
3. Affidavits in support of Application for Preliminary Injunction.
4. Order to show cause.

5. Defendant's Answer.
6. Preliminary Injunction.
7. Plaintiff's Exhibits Nos. 1, 2 and 3.
8. Opinion of Court.
9. Findings of Fact and Conclusions of Law.
10. Judgment and Decree.
11. Petition for allowance of appeal.
12. Assignments of error.
13. Order allowing appeal and fixing cost bond.
14. Cost bond on appeal.
15. Citation.
16. Stipulation re printing of record. [83]
17. Bill of Exceptions.
18. Order settling Bill of Exceptions.
19. Preliminary Injunction pending appeal.
20. This Praecipe for Transcript of Record.
21. Order Correcting Conclusions of Law and Judgment and Decree.

This transcript is to be prepared as required by law and the rules and orders of this Court and of the United States Court of Appeals for the Ninth Circuit, and to be forwarded to the United States Court of Appeals for the Ninth Circuit at San Francisco, California, so that it will be docketed therein within the time required by law and the rules of the Court.

Dated at Juneau, Alaska, this 9th day of July, 1949.

BOGLE, BOGLE & GATES.

/s/ FRANK L. MECHEM.

FAULKNER, BANFIELD &
BOOCHEVER.

/s/ H. L. FAULKNER,

Attorneys for Plaintiff-
Appellant.

Copy received this 9th day of July, 1949.

J. GERALD WILLIAMS,

Attorney General of Alaska, Attorney for Defendant-Appellee.

By /s/ JOHN H. DIMOND,
Of Counsel.

[Endorsed]: Filed July 9, 1949. [84]

ORDER CORRECTING CONCLUSIONS OF
LAW AND JUDGMENT AND DECREE

It having been called to the attention of the Court that the Conclusions of Law entered in this cause on July 8, 1949, are inconsistent with the Findings of Fact, and that the Judgment is accordingly inconsistent,

It Is Hereby Ordered that the Conclusions of Law contained in the Findings of Fact and Conclusions of Law entered on July 8, 1949, be corrected so that Conclusion of Law No. III read as follows:

“That Chapter 115, Session Laws of Alaska, 1949,

is a valid Act with the exception that the portions of Section 5-B (1) of Chapter 115 contained in the clause 'including the waters over the Continental Shelf' is indefinite, but under the severability clause contained in the Act its indefiniteness does not affect the validity of the remainder of the Act, and the Temporary Injunction granted herein on the 28th day of April, 1949, should be vacated and the Complaint dismissed."

And It Is Further Ordered that the Judgment and Decree be corrected accordingly so that the first paragraph on Page 2 thereof read as follows:

"Ordered, Adjudged and Decreed that Chapter 115, Session Laws of Alaska, 1949, is a valid Act with the exception of the phrase in Section 5-B (1), 'including the waters over the Continental Shelf,' which phrase is indefinite, but the inclusion of this phrase does not affect the remainder of the Act because of the provision of Section 15 thereof."

Done In Open Court this 9th day of July, 1949.

/s/ GEORGE W. FOLTA,

District Judge.

Filed and entered in the District Court, Territory of Alaska, 1st Division at Juneau, July 9, 1949.

CERTIFICATE

United States of America,
District of Alaska, Division No. 1—ss.

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do

hereby certify that the foregoing and hereto attached 85 pages of typewritten matter, numbered from 1 to 85, both inclusive, constitute a full, true and complete copy, and the whole thereof, of the record prepared in accordance with the praecipe of the Appellant on file herein and made a part hereof, in Cause No. 6069-A, wherein the Alaska Steamship Company, a corporation, is Plaintiff-Appellant and M. P. Mullaney, Commissioner of Taxation, Territory of Alaska, is Defendant-Appellee, as the same appears of record and on file in my office; that said record is by virtue of an appeal and Citation issued in this cause and the return thereof in accordance therewith.

And I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certification amounting to Thirty Dollars and 50/100 has been paid to me by Counsel for Appellant.

In Witness Whereof, I have hereunto set my hand and the seal of the above-entitled court this 20th day of July, 1949.

J. W. LEIVERS,

Clerk of District Court,

[Seal] By /s/ P. D. E. McIVER,

Deputy.

[Endorsed]: No. 12298. United States Court of Appeals for the Ninth Circuit. Alaska Steamship Company, a corporation, Appellant, vs. M. P. Mullaney, Commissioner of Taxation, Territory of Alaska, Appellee. Transcript of Record. Appeal from the District Court for the Territory District of Alaska, Division Number One.

Filed July 22, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12298

ALASKA STEAMSHIP COMPANY, a corpora-
tion,

Appellant,

vs.

M. P. MULLANEY, Commissioner of Taxation,
Territory of Alaska,

Appellee.

STATEMENT OF POINTS RELIED ON AND
DESIGNATION OF PARTS OF RECORD
TO BE PRINTED.

Comes now the appellant above named and adopts the Assignments of Error as its Statement of Points to be relied on in the United States Court of Appeals, and prays that the whole of the record as filed and certified, be printed.

Dated at Juneau, Alaska, July 9, 1949.

BOGLE, BOGLE & GATES,
FRANK L. MECHEM,
FAULKNER, BANFIED
& BOOCHEVER,

H. L. FAULKNER,

By /s/ H. L. FAULKNER,

Attorneys for Appellant.

Docketed.

[Endorsed]: Filed July 26, 1949.